APPENDIX B
BOARD DECISIONS IN IMRL PROCEEDING

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SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34177

IOWA, CHICAGO & EASTERN RAILROAD CORPORATION—ACQUISITION AND OPERATION EXEMPTION—LINES OF I&M RAIL LINK, LLC

Decided: July 22, 2002

In this decision, the Board denies requests to stay the effectiveness of the exemption in this proceeding and removes the housekeeping stay issued on June 26, 2002. Petitions to revoke the exemption will be addressed in a later decision or decisions.

On June 7, 2002, Iowa, Chicago & Eastern Railroad Corporation (IC&E) filed a notice of exemption under 49 CFR 1150.31 to acquire and operate the rail lines and assets of I&M Rail Link, LLC (IMRL), a Class II carrier.[1] IC&E's notice was filed pursuant to our class exemption from the prior approval requirements of 49 U.S.C. 10901 for rail line acquisitions by a noncarrier that will become a Class I or Class II carrier as a result of the acquisition. See Class Exemption–Acq. & Oper. Of R. Lines Under 49 U.S.C. 10901, 1 I.C.C.2d 810 (1985), aff'd, Illinois Commerce Commission v. ICC, 817 F.2d 145 (D.C. Cir. 1987) (Acquisition Exemption).[2] The notice of exemption indicates that IC&E is a noncarrier subsidiary of Cedar American Rail Holdings, Inc. (Holdings), which is a wholly

[1] IC&E filed a notice of intent of its proposal on May 24, 2002, as required under our class exemption procedures at 49 CFR 1150.35(a).

[2] In this type of transaction the applicant must, at least 60 days before the exemption becomes effective, post a notice of the proposed transaction at the workplace of the employees on the affected lines and serve a copy of the notice on the national offices of the employees' unions. The notice must also specify the types and numbers of jobs expected to be available, the terms of employment and principles of employee selection, and the lines to be transferred. See 49 CFR 1150.35(a), referring to 49 CFR 1150.32(e). On February 26, 2002, IC&E certified to the Board that, in compliance with our Acquisition Exemption rules, it had posted a notice at the workplace of the employees of IMRL on February 25, 2002, and served a copy of the notice on the national offices of all labor unions with employees on the affected lines, indicating that IC&E intends to acquire and operate the rail lines of IMRL.

owned subsidiary of Dakota, Minnesota & Eastern Railroad Corporation (DME).[3] In its notice, IC&E states that DME and Holdings expect to file an application, pursuant to 49 U.S.C. 11323(a)(3) and 49 CFR 1180.2(c), to continue in control of IC&E soon after IC&E acquires the IMRL lines and becomes a rail carrier. In the meantime IC&E and DME will have a voting trust arrangement to insulate IC&E from DME control.

IC&E states that it intends to acquire all of IMRL's existing rail lines, which extend approximately 1,125 miles between Chicago, IL, Kansas City, MO, and Minneapolis/St. Paul, MN, as well as across Northern Iowa and Southern Minnesota. According to IC&E, it will also acquire by assignment from IMRL approximately 275 miles of incidental trackage rights over line segments of other carriers. In addition, IC&E states that it will acquire: (1) IMRL's ownership and operational interests in The Kansas City Terminal Railway Company; (2) IMRL's ownership and operational interests in the so-called "Joint Agency" in Kansas City (jointly owned with The Kansas City Southern Railway Company); and (3) IMRL's interests in jointly owned and/or operated industry trackage in various locations, including South Beloit, IL, Beloit and Janesville, WI, and Clinton, IA.

Notice of IC&E's filing was served by the Board on June 12, 2002, and published in the Federal Register on June 17, 2002, at 67 FR 41297-98. Under our Acquisition Exemption procedures, IC&E's authority to acquire these rail properties, unless stayed, would have become effective 21 days after the notice was filed. See 49 CFR 1150.35(e).[4] IC&E indicated in its notice

[3] DME is a Class II railroad currently operating an 1,100-mile rail system in Minnesota, South Dakota, Nebraska, and Iowa. In a decision served January 30, 2002, in Dakota, Minnesota & Eastern Railroad Corporation Construction Into The Powder River Basin, STB Finance Docket No. 33407 (hereinafter DME Construction), the Board gave DME final approval, subject to a number of environmental mitigation conditions, to construct a new 262-mile rail line into Wyoming's Powder River Basin. Judicial review of that decision is pending in the United States Court of Appeals for the Eighth Circuit in No. 02-1359, et al., Mid States Coalition For Progress, et al. v. STB and United States.

[4] The Acquisition Exemption procedures provide for announcement of the notice of exemption in the Federal Register. If the notice contains false or misleading information, the exemption may be declared void ab initio. 49 CFR 1150.32(c). An interested party can oppose the exemption by filing a petition to revoke at any time, after consideration of which we can revoke the exemption in whole or in part if we find that additional regulatory scrutiny is necessary to carry out the national transportation policy of section 10101. 49 U.S.C. 10502(d); Acquisition Exemption, 1 I.C.C.2d at 812 (1985) (specifically reserving right to reimpose total or partial regulation, after the fact, in cases filed under the Acquisition Exemption procedure). See generally Pittsburgh & Lake Erie R. Co. v. RLEA, 491 U.S.

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that it would seek to consummate the acquisition of IMRL's lines and commence operations on or after June 28, 2002. On June 24, 2002, however, IC&E filed a letter with the Board stating that it did not intend to consummate the transaction until July 26, 2002, to allow it time to resolve an issue involving access to the Chicago gateway. Accordingly, in a decision served June 26, 2002, the Board issued a "housekeeping" stay in this proceeding until July 26, 2002.

In a pleading filed July 12, 2002, IC&E states that it has entered into haulage agreements that satisfy its access concern and requests that the Board lift the housekeeping stay sooner and allow the transaction to proceed. IC&E now expects to be able to close the transaction as early as July 22, if the stay is lifted.

PETITIONS TO STAY OR TO REVOKE

On June 13, 2002, the Brotherhood of Locomotive Engineers, the Brotherhood of Maintenance of Way Employes, the Brotherhood of Railroad Signalmen, the International Association of Machinists, the International Brotherhood of Electrical Workers, and the Transportation Communications International Union (collectively referred to as Cooperating Labor Organizations or CLO) jointly filed a petition for stay (designated CLO-1) and a petition to revoke the class exemption as it applies to this transaction (designated CLO-2).[5] On June 14, 2002, the Iowa Department of Transportation (IADOT) filed a statement asking that we stay the effective date of the exemption and establish a procedural schedule for subjecting this transaction to further scrutiny.[6]

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490, 499-501 (1989).

[5] On July 16, 2002, CLO filed a motion for an order compelling discovery (CLO-3), a supplement to their petition for stay and opposition to motion to lift stay (CLO-4), and a motion for extension of time in which to supplement the petition to revoke (CLO-5). Because CLO's motion to compel discovery and their motion for extension of time relate to their revocation request, we will handle them in a future decision in this proceeding. We will, however, consider CLO's supplement to their stay petition here.

[6] On June 14, 2002, Ag Processing Inc. (AGP) filed a petition to stay and revoke the Acquisition Exemption as applied to this transaction and Iowa Traction Railroad Company (IATR) filed a petition for stay and investigation. In their petitions, AGP and IATR expressed concern that various interchange agreements necessary for IC&E to reach Chicago and Minneapolis/St. Paul have been canceled and they maintained that the transaction should be stayed for IC&E to explain how it intends (continued...)

In their CLO-1 stay petition, the Cooperating Labor Organizations contend that DME is the real party in interest in this proceeding and that, therefore, the transaction should be viewed as an acquisition of an existing carrier (IMRL) by another existing carrier (DME). CLO argues that the Board's Acquisition Exemption procedure available to noncarriers does not apply to this transaction and that the proposal must be resubmitted under 49 U.S.C. 11323 as a transaction involving DME's acquisition of IMRL. According to CLO, a stay is required because of uncertainty surrounding the transaction's effect on: (1) the financial viability of the combined DME/IMRL; (2) the likelihood of coal movements from the Powder River Basin related to DME Construction being routed on IMRL's grain lines; (3) existing shippers and communities; and (4) railroad employees. CLO contends that a stay for a reasonable period would not harm DME or IMRL and that, in view of CLO's pending discovery requests, the Board should direct IC&E and DME to respond to those requests on an expedited basis.

In the CLO-2 petition to revoke the use of the Acquisition Exemption procedure for this transaction, CLO argues that controlling precedent requires that DME be considered the purchaser of IMRL and that, as a matter of law, we should require DME to join as a party to IC&E's acquisition transaction. CLO maintains that the acquisition of IMRL is subject to the requirements of 49 U.S.C. 11323 because DME is acquiring all of an existing rail carrier, not merely part of its rail assets.[7] CLO contends that, in any event, IC&E is not sufficiently independent of DME to be entitled to use the Acquisition Exemption procedure. CLO argues that IC&E's notice of exemption is thus void ab initio under our rules at 49 CFR 1150.32(c) because the proposed transaction cannot proceed under 49 U.S.C. 10901.[8]

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to continue the rail service presently provided by IMRL. However, by letters filed July 11 and 12, 2002, respectively, AGP and IATR indicate that IC&E has satisfied their service concerns and that they withdraw their stay petitions and now support IC&E's acquisition of IMRL and the related forthcoming common control request.

On July 18, 2002, Arkansas Electric Cooperative Corporation (AECC) filed a petition to revoke and comments. On July 19, 2002, IC&E replied to AECC's filing. We will handle AECC's filing in a future decision in this proceeding.

[7] CLO argues that the procedures of 49 U.S.C. 10902 (available for line acquisitions by Class II or Class III rail carriers) also do not apply here because the transaction is to acquire all of the assets of IMRL, not just one or more of its lines.

[8] IADOT also asks us to give Iowa shippers and communities the opportunity to present their views on the possible adverse effects of the proposal before allowing the exemption to become

In addition to the petitions for stay or to revoke, the Board received a number of responses from interested parties expressing concerns about the proposed transaction.[9]

REPLY BY IC&E

In its reply, IC&E maintains that its use of the Acquisition Exemption procedure here is entirely appropriate and that petitioners have failed to establish a case for revocation or stay of its notice of exemption. According to IC&E, petitioners' argument that transactions involving the creation of new Class II carriers must be automatically stayed and investigated would simply write the Acquisition Exemption out of existence. IC&E recognizes that several similarly-sized transactions may have been temporarily stayed in the past, but asserts that our subsequently adopted advance notice regulations

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effective.

[9] We have received comments on the proposed transaction from the following parties (addressing the subjects noted in parenthesis): the United States Department of Transportation (USDOT) (seeking expansion of environmental oversight that will take place in DME Construction to encompass communities on IMRL lines); North Central Farmers Elevator and South Dakota Farm Bureau (support of IC&E's acquisition); The Kansas City Southern Railway Company (concerns related to IC&E's financial viability and independence); Regional Transportation Authority of Northeast Illinois, Commuter Rail Division, d/b/a Metra (raising issues related to assignment of IMRL's trackage rights); MSA Professional Services, Inc. (issues related to trail use negotiation); the Brotherhood of Locomotive Engineers (opposition to the transaction); and Ronald D. Barczak and William G. Jungbauer (IMRL employee injury claims).

The Board has also received correspondence from the following parties concerning IC&E's proposed acquisition: United States Senators Charles E. Grassley (concern for Iowa shippers) and Mark Dayton (community and process concerns); United States Congressmen James A. Leach and Jim Nussle, the municipality of Dubuque, IA, and Sethness Products Company (all with concerns related to financial viability, environmental/community impacts, and shipper effects); United States Congressman John Thune (support of IC&E's acquisition of IMRL); Tyson Foods, Inc. (rail service concerns); Adrian Carriers Inc., Atlas Intermodal Trucking Service, Quad City Port Services, Inc., East Central Intergovernmental Association, the Missouri Department of Transportation, the municipalities of Bellevue, Bettendorf, Davenport, Guttenberg, Marquette and Mason City, IA, and Winona, MN (all with community, environmental, shipper, or process concerns); and the Dubuque County Board of Supervisors (grain and agricultural marketing concerns).

obviated the need for such stays.[10] IC&E also notes that in none of those prior stayed transactions did the Board ultimately find any basis to revoke the use of the Acquisition Exemption procedure. IC&E states that it has complied fully with both the letter and the spirit of our rules.

IC&E maintains that its proposed acquisition of IMRL's rail lines represents the best, and probably last, opportunity to preserve rail service on behalf of local shippers on the IMRL system. IC&E contends that the requested stays would materially and adversely impact its start-up economics, interfere with service transition, and disrupt its comprehensive employee hiring process. An extended stay, according to IC&E, would foreclose its ability to complete the IMRL acquisition.[11] IC&E emphasizes that IMRL's creditors have confirmed that the IC&E transaction is the last attempt to avoid loan acceleration proceedings and that, if the sale is not consummated, the carrier's bankruptcy would likely result. According to IC&E, IMRL incurred a loss after fixed charges of over $16 million in 2001 and has not made principal or interest payments on its debt since November 2000.[12]

[10] IC&E cites Acq. of R. Lines Under 49 U.S.C. 10901 & 10902 – Advance Notice, 2 S.T.B. 592, 601 (1997) (Advance Notice), aff'd sub nom. Ass'n of Am. Railroads v. STB, 161 F.3d 58 (D.C. Cir. 1998) (AAR), and 49 CFR 1150.32(e).

[11] IC&E indicates that, under the asset purchase agreement between the parties, if its acquisition of IMRL's lines is not completed by late July 2002, the purchase agreement terminates. In a letter dated July 19, 2002, IC&E states that it has received confirmation of the completion and commitment of financing for its acquisition of IMRL's rail lines.

[12] In a letter filed July 2, 2002, Thomas E. McGraw, vice president of the Bank of Montreal, states that IC&E's acquisition is the best alternative to IMRL's indebtedness and that, if the transaction is not consummated on a timely basis, IMRL's senior creditors will have to consider alternative legal remedies. But in a letter filed July 10, 2002, IMRL's current owners, Soo Line Railroad Company and I&M Holdings, LLC, take issue with IC&E's assertion that there is no status quo option for IMRL, stating that they are prepared to resubmit their refinancing proposal to creditors so that uninterrupted service on behalf of IMRL's shippers can continue even if the proposed transaction is not completed. And in its CLO-4 supplement, filed July 16, 2002, CLO contends that there is no urgent need to lift the stay because IMRL's current owners, in a message to employees, contradict IC&E's "failing firm" claims and, even if the transaction is not closed by the end of July and IMRL's creditors force it into bankruptcy, the carrier should have no trouble operating under a trustee in reorganization.

By letters filed July 17 and 18, 2002, IC&E responds that, because IMRL's owners are unwilling to improve their rejected refinancing proposal, the Board should not accord any weight to their last minute effort to derail IC&E's acquisition. IC&E also asserts that CLO's dismissive attitude

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IC&E maintains that it will end IMRL's present difficulties and provide competitive, efficient rail service, tailored to the needs of IMRL's shippers, with experienced employees and an economically realistic operating and business plan.[13] IC&E indicates that it will replace IMRL's existing locomotive fleet with a substantially more modern and reliable fleet of locomotives and that this new motive power will significantly reduce maintenance and fuel costs and increase train reliability and performance. According to IC&E, the lease rates for its newer locomotives are significantly lower than those currently paid by IMRL on the leased portion of its engine fleet.

In response to shipper concerns about the possible diversion of overhead haulage traffic currently handled for UP, IC&E argues that the existing haulage agreement with UP is actually detrimental to on-line IMRL shippers and that IMRL has incurred high capital costs as a result of moving this UP traffic. In IC&E's view, the current UP haulage agreement is based on flawed assumptions and would need to be renegotiated to make it compatible with on-line operations and future capital needs on IMRL lines. According to IC&E, the UP haulage traffic is marginal, at best, for IMRL and, while IC&E will continue to try to secure such business if it can obtain the traffic on a remunerative basis, the existing UP haulage traffic has not been included in the financial modeling or business plan for the IMRL acquisition. Rather than harming IMRL's customers, IC&E contends that the absence of the existing UP haulage traffic would allow IC&E to better focus on the transportation needs of its own customers.[14]

IC&E initially indicated that, while there are alternative routing options into Chicago, it expected to continue operations via an assignment of a trackage rights agreement under which Canadian Pacific

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regarding a potential IMRL bankruptcy does not serve the interests of employees. By letter filed July 18, 2002, Thomas McGraw reaffirms his prior statement and asserts that IMRL's owners have no basis to suggest that their inferior proposal would be accepted by the lenders. In response to IC&E's request that IMRL state its position on the Asset Purchase Agreement between IC&E and IMRL, IMRL's Board of Managers filed a letter on July 18, 2002, stating that IMRL remains ready to close on the agreement in accordance with the terms and, to avoid continuing uncertainty, it requests Board action to allow it to proceed to closing.

[13] IC&E estimates that it will have only half the debt load currently borne by IMRL.

[14] Similarly, IC&E indicates that IMRL's intermodal traffic has been unprofitable. Given the short-distance markets in which IMRL operates and high terminal access fees and operating costs faced by IMRL, IC&E asserts that intermodal traffic has not made business sense on the IMRL lines and that this traffic is not included in its business plan for the IMRL transaction.

Railway (CP) has admitted IMRL to the rail line between Pingree Grove, IL, and Chicago owned by the Commuter Rail Division of the Regional Transportation Authority of Northeast Illinois, d/b/a Metra. However, Metra has objected to assignment of that agreement and has indicated that it will not allow IC&E to use the Metra line. IC&E has stated that it does not intend to consummate the IMRL transaction unless and until it is assured of viable access to the Chicago terminal, either through agreement with Metra, a determination of IC&E's rights under the assigned trackage rights agreement, or arrangements with other rail carriers to reach Chicago. In its pleading filed July 12, 2002, IC&E states that it has now entered into separate haulage arrangements with two railroads — Chicago, Central & Pacific Railroad and Iowa Interstate Railroad — for alternative access to Chicago and that, following constructive discussions with Metra, IC&E believes that a third Chicago routing via Metra will also become available to it.

IC&E states that its service plan for on-line local customers will be essentially identical to that offered today by IMRL and will be conducted and overseen by an IC&E workforce and line management comprised almost entirely of former IMRL employees. IC&E maintains that its acquisition of IMRL's lines will improve the security and income of most IMRL employees. IC&E states that, since February 25, 2002, when it posted and served the 60-day notice required by 49 CFR 1150.32(e), it has engaged in a comprehensive and wide-ranging informational, recruiting and hiring campaign among IMRL's workforce and has conducted numerous town hall and departmental meetings across the IMRL system. According to IC&E, 95% of interested, active, full-time IMRL employees have been offered jobs on IC&E and virtually no IMRL employees hired by IC&E would receive a cut in pay; rather, the vast majority would experience a significant salary increase.[15] IC&E indicates that new employees would be able to choose their healthcare plan from among the existing IMRL plan, the proposed plan between DME (IC&E's affiliated company) and the United Transportation Union, or the plan in effect for non-union employees on DME. In addition, IC&E states that former IMRL employees would generally retain their existing years of service credit for seniority and vacation and would receive a moving allowance to cover expenses related to necessary relocations.

DISCUSSION AND CONCLUSIONS

The issue before us here is whether petitioners have shown sufficient reason why IC&E should not be allowed to proceed at this time under the Acquisition Exemption procedure for this transaction. As discussed below, we conclude that the IC&E/IMRL transaction qualifies for the class exemption.

[15] IC&E indicates that wage rates will increase by 8-11% for local and yard train crews and by 5.5%-7.5% for road train crews, and that extra board crews will receive at least current IMRL rates.

Although in certain cases a stay of the effective date of a notice of exemption may be warranted, Acquisition Exemption contemplates that generally transactions may be consummated prior to our regulatory review and that concerns such as those that have been raised by petitioners here (uncertainty about the transaction's effect on the railroad(s), communities and existing shippers along the existing IMRL lines, and railroad employees) will be addressed through the revocation process of 49 U.S.C. 10502(d).[16] In this case, no need to stay the effective date of the notice of exemption has been shown. Thus, we will now lift the housekeeping stay and allow the acquisition to proceed. We will address the merits of the pending petitions to revoke the exemption authority and the merits of the forthcoming application of DME for common control in future decisions.

1. Applicability of the Acquisition Exemption. The Acquisition Exemption procedure is intended to serve shipper and community interests by facilitating continued rail service, on lines that the selling carrier can no longer operate economically, by new carriers seeking to provide service more efficiently. 1 I.C.C.2d at 813, 817. As the ICC explained when it adopted the judicially approved class exemption in 1985 (id.), line sales to noncarriers under the Acquisition Exemption procedure

> generally will maintain the status quo and will not change the competitive situation. The vital interests of shippers, communities, and carriers will be served by this exemption because it will result in the continuation of service that might otherwise be lost.

There is no allegation here that IC&E has failed to comply with the procedures of the Acquisition Exemption. Rather, petitioners argue that the exemption should be revoked because the transaction does not qualify for an exemption from 49 U.S.C. 10901, as it is a transaction covered under 49 U.S.C. 11323 rather than 49 U.S.C. 10901. They base their position on the fact that IC&E is acquiring control of all of IMRL's assets, rather than a portion of those assets, and on their argument that the real party in interest in this acquisition is DME, not IC&E. Their argument, however, fails to persuade us that section 10901 and the class exemption do not apply here.

[16] In most cases this is a satisfactory remedy because, as the ICC explained in the Acquisition Exemption, 1 I.C.C.2d at 812, any affected party can file a petition to revoke at any time and attempt to show that additional regulatory scrutiny is necessary to carry out the rail transportation policy. "Transactions under this class exemption involve the transfer of discrete, defined property that would not be 'lost' in the property of the acquirer." Id. Thus, unless a party has shown that allowing the transaction to be consummated will produce irreparable harm in some other way, any transaction can be reversed in whole or in part, after it has gone into effect, if appropriate. Id. The agency has specifically reserved "the right to require divestiture to avoid abuses of market power resulting from the transaction, or to regulate in accord with the provisions of the rail transportation policy." Id.

On occasion, noncarriers like IC&E have acquired substantially all of an existing carrier's rail lines and assets pursuant to section 10901. In those cases, parties have argued that the transactions came within section 11323 (formerly 49 U.S.C. 11343), not section 10901. The Board and the ICC, with the approval of the courts, however, have rejected those arguments. See, e.g., Brotherhood of Locomotive Eng'rs v. ICC, 909 F.2d 909 (6th Cir. 1990); Brotherhood of Ry Signalmen v. ICC, 817 F.2d 1172 (D.C. Cir. 1987) (Signalmen); Railway Labor Exec. Ass'n v. ICC, 914 F.2d 276 (D.C. Cir. 1990) (noncarrier affiliate purchasing railroad property under section 10901). See also New England Central Railroad, Inc. – Acquisition and Operation Exemption – Lines Between East Alburgh, VT and New London, CT, Finance Docket No. 32432 (ICC served Dec. 9, 1994), aff'd sub nom. Signalmen; I&M Rail Link, LLC – Acq. & Oper. Exem. – Canadian Pacific Ry. 2 S.T.B. 167 (1997); Georgia & Florida Railroad Co., Inc. – Acquisition, Lease and Operation Exemption – Norfolk Southern Railway Company, STB Finance Docket No. 32680 (STB served Mar. 18, 1996) (G&F). Thus, IC&E's acquisition of substantially all of the assets of IMRL does not bring the transaction within section 11323.

Petitioners rely on United States v. Marshall Transport, 322 U.S. 21 (1944), and Fox Valley & Western Ltd.– Exempt., Acq. and Oper., 9 I.C.C.2d 209 (1992), aff'd sub nom. Fox Valley & Western Ltd. v. ICC, 15 F.3d 641 (7th Cir. 1994) to support their "alter ego" argument.[17] But their reliance on Marshall and Fox Valley is misplaced. Both of those cases concerned an acquisition by a noncarrier of two carriers, a type of acquisition that does require our approval under section 11323(a)(4). That type of acquisition necessarily places the two acquired carriers under common control. In contrast, the situation we have here, the acquisition of the rail lines of a single carrier by a noncarrier, is squarely covered by section 10901(a)(4), as added in the ICC Termination Act of 1996 (ICCTA).[18] As we explained in G&F, at 3:

[17] Under the "alter ego" test, the Board considers: (1) whether the noncarrier subsidiary was created to purchase the line for legitimate and substantial business reasons (e.g., insulation from financial risk, preservation of service, or time constraints) and not solely to avoid labor protection; and (2) whether the indicia of independence establish that the noncarrier subsidiary is sufficiently independent of its parent or affiliated carriers. Mountain Laurel Railroad Company – Acquisition and Operation Exemption – Consolidated Rail Corporation, STB Finance Docket No. 31974 (STB served May 15, 1998) (Mountain Laurel).

[18] Even before ICCTA, when there was no clear reference to acquisitions in section 10901, the agency, with court approval, had consistently treated noncarrier acquisitions of the assets of a single carrier as embraced by section 10901.

> Prospective carriers and their owners have adopted a two-step process for obtaining control – the acquisition transaction and the continuance in control transaction. This procedure has been used many times in the past and has been used by [applicants] here. This two-step process has been consistently upheld on judicial review.

The arguments by CLO and IADOT to collapse this two-step process into one step would conflict with this well-established precedent.

CLO's position is that IC&E and DME are one and the same and that we should thus pierce the corporate veil and consider this to be an acquisition by DME itself. We have consistently chosen not to disregard the existence of a noncarrier corporate subsidiary in this context, however, where (a) the subsidiary was created to purchase the line for legitimate and substantial business reasons (e.g., insulation from financial risk, preservation of service, or time constraints) and not solely to avoid labor protection, and (2) the noncarrier subsidiary is in fact a separate, sufficiently independent company. It is not required that the new noncarrier be totally independent of its affiliates, simply that it be a separate, real company in its own right, responsible for its own accounts.

Here, IC&E has explained that the reason for its creation is to insulate DME from the financial risk associated with a troubled rail operation that has changed hands three times in 15 years. IC&E also indicates that it will operate with its own locomotives, cars and employees, will have its own operating management, will hold out to provide service in its own name, and will be responsible for the risks and financial obligations arising from its operations. DME will guarantee certain start-up debt of IC&E and will share certain management and operations with IC&E, but such arrangements are common among affiliated carriers and do not detract from the financial and operational independence of subsidiary carriers such as IC&E. See, e.g., Mountain Laurel at 14-17.

In sum, petitioners have fallen far short of the showing that is required to compel us to pierce the corporate veil in this situation.[19] Thus, based on the information available to date, we find that this case comes within 49 U.S.C. 10901 and qualifies for the Acquisition Exemption procedure.

[19] As indicated, on July 16, 2002, in addition to supplementing its stay petition, CLO filed a motion to compel discovery and a motion for extension of time in which to supplement its petition to revoke. In view of its recently filed pleadings, it is apparent that CLO intends to pursue and supplement its alter ego argument. We will address any further arguments that it makes when we consider the petitions for revocation.

2. Need for a Further Stay. We must also decide whether a further stay of the effective date of the notice of exemption is warranted in this case. Contrary to the claims of those seeking a further stay, there are good reasons here to allow the acquisition to proceed and to rely on our broad revocation power to address the concerns about this transaction that the parties have raised.

Under the asset purchase agreement between IC&E and IMRL, IC&E must consummate its acquisition of IMRL's lines by the end of July 2002. According to IC&E, IMRL's lenders have indicated that, if the transaction is not completed in a timely manner, IMRL most likely will face bankruptcy. Although CLO and IMRL's current owners disclaim IC&E's failing firm assertions, the ability of IMRL to continue to operate absent this acquisition is by no means certain, and it appears that allowing the acquisition to proceed as scheduled presents the best opportunity for uninterrupted and possibly improved service to shippers on the IMRL system. Indeed, many IMRL shippers, including grain shippers on IMRL's so-called "Corn Lines," support IC&E's proposed acquisition.[20] They and other IMRL shippers could lose the opportunity for IC&E's service and its commitment to increase operational reliability and provide stable and competitive rail service on the IMRL lines if this transaction does not proceed promptly. Thus, the requested stay, if imposed, would have potentially harmful consequences for IC&E and the customers of IMRL and, as discussed below, for employees of IMRL.

Notwithstanding CLO's request, a stay is not required to protect rail employees from irreparable harm. Rather, IC&E has represented that IMRL employees would, on the whole, benefit under its ownership and that 95% of interested, full-time IMRL employees have been offered positions at comparable or higher pay levels. IC&E states that it will also provide a number of other employee benefits. Neither CLO nor any other party has provided specific evidence of actual or potential harm to IMRL employees. Thus, a stay of the effective date of the exemption would not be appropriate. Should IC&E not adhere to its representations, we can address the matter later, in response to a petition for revocation.

Petitioners suggest that a stay would give employees necessary time to prepare for and adjust to their change of employer. But employees have had the benefit of the 60-day advance notice provision required by 49 CFR 1150.32.(e), which is specifically intended to provide employees with

[20] IC&E appended to its reply supporting statements from seven shippers located on IMRL's lines. One of those shippers, Southern Grainbelt Shippers Association, lists approximately 67 businesses or entities as members of its association. IPSCO Steel Inc., Monsanto Company, Wisconsin & Southern Railroad Company, and National Farmers Union also filed statements supporting IC&E's acquisition of IMRL's rail assets. See also IC&E's filing on July 15, 2002, listing additional shipper support.

timely hiring and job information and avoid the confusion and uncertainty that had often led to stays in the past. See Advance Notice; AAR. As discussed above, IC&E has complied with the letter and intent of that regulation. And, as a result of the Board's housekeeping stay, employees have had even more time to learn about the instant acquisition transaction.

3. Environmental Issues. Finally, several entities, including IADOT and the USDOT, have raised concerns regarding the need to address the environmental effects of potential DME traffic, including coal from the Powder River Basin related to DME Construction, moving over the rail lines of IC&E. As discussed below, however, a stay of the effective date of the notice of exemption is not required because we can allow the acquisition to proceed with conditions that assure that any cumulative impacts of traffic related to DME Construction moving over IMRL lines will be fully addressed before any such operations can take place.

The Applicable NEPA Requirements. The National Environmental Policy Act, 42 U.S.C. 4321-43 (NEPA), generally requires federal agencies to consider "to the fullest extent possible" environmental consequences "in every recommendation or report on major federal actions significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C). Under both the regulations of the Council on Environmental Quality (CEQ) implementing NEPA and our own environmental rules, actions whose environmental effects are ordinarily insignificant may be excluded from NEPA review across the board, without a case-by-case review.[21] Such activities are said to be covered by a "categorical exclusion," which CEQ defines at 40 CFR 1508.4 as

> . . . a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no effect in procedures adopted by a federal agency in implementation of these regulations . . . and for which, therefore, neither an environmental assessment nor an environmental impact statement is required.

Our environmental rules contain various categorical exclusions. As pertinent here, an acquisition proposal that would not result in operational changes that exceed certain thresholds — generally an increase in rail traffic of at least eight trains a day or 100 percent in traffic (measured in

[21] 40 CFR 1500.4(p), 1501.4(a)(2), 1508.4; 49 CFR 1105.6(c).

gross ton miles annually) — normally requires no environmental review.[22] 49 CFR 1105.6(c)(2)(i), 1105.7(e).[23]

This Acquisition. IC&E asserts in its notice that the proposed acquisition is exempt from environmental reporting requirements because it would cause only modest changes in carrier operations, none of which would exceed the thresholds triggering environmental review established in 49 CFR 1105.7(e)(4) or (5) and 49 CFR 1105.6(c)(2)(i).[24] According to IC&E, IMRL currently operates approximately 10 through trains and 15 yard assignments each day.[25] IC&E states that it will continue service on all IMRL lines now operated by IMRL and "generally will maintain existing service frequency levels" on those lines following the acquisition.[26] According to IC&E, any modifications or adjustments to service patterns and frequency would be made gradually, and only after IC&E has become familiar with the traffic and service requirements of the IMRL lines.[27]

[22] An agency's procedures for categorical exclusions "shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect, thus requiring an Environmental Assessment (EA), or an Environmental Impact Statement (EIS)." 40 CFR 1508.4. See 49 CFR 1105.6(d). But absent extraordinary circumstances, once a project is found to fit within a categorical exclusion, no further NEPA procedures are warranted.

[23] See, e.g., Canadian National Railway Company, Grand Trunk Corporation, and WC Merger Sub, Inc. — Control — Wisconsin Central Transportation Corporation, Wisconsin Central Ltd., Fox Valley & Western Ltd., Sault Ste. Marie Bridge Company, and Wisconsin Chicago Link Ltd., STB Finance Docket No. 34000, Decision No. 9 (STB served Aug. 2, 2001).

[24] Where properties 50 years old or older may be affected, historic review under the National Historic Preservation Act, 16 U.S.C. 470-470t (NHPA), may be required. See 49 CFR 1105.8(b)(1). IC&E asserts, however, that the proposed transaction is exempt under 49 CFR 1105.8(b)(1) from historic review under NHPA. IC&E explains that its acquisition of the IMRL lines is for the purpose of continued rail operations and that further approval will be required to abandon any service. IC&E also states that it has no plans to dispose of or alter any properties subject to the Board's jurisdiction that are 50 years old or older. We agree with IC&E that the acquisition project is excepted under 49 CFR 1105.8(b)(1) from the NHPA review procedures.

[25] Notice at 5.

[26] Id.

[27] Id.

We agree that an environmental review is not necessary simply for IC&E to acquire substantially all of the assets of IMRL. IC&E anticipates only modest changes in existing carrier operations that would not meet the thresholds in our regulations triggering an environmental review. Preparation of an EA or an EIS for the acquisition of IMRL is not warranted because there is nothing in the environmental information that is currently available to indicate any potential for significant environmental impacts.[28]

As noted, however, we recently granted final approval in DME Construction for IC&E's parent, DME, to construct and operate a new 280-mile rail line into Wyoming's Powder River Basin.[29] As USDOT and IADOT note in their filings, it is possible that construction and operation of that new line could result in substantial additional traffic on what are now the IMRL lines as a result of this acquisition.[30] But in DME Construction, as in all of our licensing proceedings, our construction authority is permissive.[31] DME will have to acquire the right-of-way, secure financing, and obtain approvals from certain cooperating agencies before it can construct the new line. Thus, it is not yet definite that the construction project will proceed. Moreover, as DME has not yet obtained any

[28] IC&E notes that it intends to construct a new heavy locomotive repair facility at a central location on the IMRL lines during the next 2 years. But plans for such a facility are only in the development stage and are too preliminary to be assessed now.

[29] The Board's Section of Environmental Analysis (SEA), in coordination with five cooperating agencies that have statutory mandates to review issues implicated by the project, undertook a detailed environmental review in that case, culminating in a 2,500-page Final EIS issued in November 2001, addressing a broad range of environmental issues. Based on that review, in our decision approving DME Construction, we imposed extensive environmental conditions to mitigate certain anticipated adverse environmental impacts. We did not address the proposed acquisition in our EIS in DME Construction, however, as the proposed acquisition transaction was not announced until after we had given final approval for that line to be constructed.

[30] See also the letter comment from Senator Mark Dayton.

[31] See Big Stone-Grant Industrial Development and Transportation, L.L.C.– Construction Exemption – Ortonville, MN and Big Stone City, SD, STB Finance Docket No. 32645 (STB served June 9, 1998); Western Fuels Service Corporation v. The Burlington Northern And Santa Fe Railway Company, STB Docket No. 41987 (STB served July 28, 1997); Star Lake Railroad Company — Rail Construction and Operation in McKinley County, New Mexico, STB Finance Docket No. 28272 (ICC served Apr. 10, 1987).

specific contracts to handle Powder River Basin coal, how the carrier intends to route the traffic coming from or moving to the new line is not known at this time.[32]

To meet our obligations under NEPA, should we later decide not to revoke the exemption authority for this transaction and to approve the forthcoming application for common control of IC&E and DME, we will consider in this proceeding the cumulative impacts[33] of those actions together with our approval of the new line in DME Construction — i.e., the prospect of adding at least a portion of that substantial traffic to the traffic that now moves over what are now IMRL lines — if and when DME has obtained authority to control IC&E and is prepared to exercise the construction authority that we issued in DME Construction.[34] Deferring that examination is appropriate here, given the current uncertainty as to whether the line approved in DME Construction will be built and, if built, what portion of the traffic to and from the new line would move over which IMRL lines. Because the information we

[32] In DME Construction, DME identified potential points at which rail traffic would leave the existing DME system and move north or south over other carriers (including IMRL at Owatonna, MN). However, DME does not have any coal contracts yet. Accordingly, the ultimate destination of its potential Powder River Basin coal traffic is not known, and the number of trains that would interchange at any particular point is unavailable. Therefore, in the EIS in DME Construction, SEA evaluated the environmental impacts associated with 3 levels of potential coal traffic: 20 million tons per year (mnt), 50 mnt, and 100 mnt, or, stated differently, from 8 to 34 unit coal trains per day.

[33] The CEQ regulations define "cumulative impacts" as "the impact on the environment which results from the incremental consequences of an action when added to the other past, present, and reasonably foreseeable future actions, regardless of what agency or person undertakes such other actions." 40 CFR 1508.7.

[34] We see no need to reopen DME Construction to supplement the already-completed environmental review process in that case or to handle the potential environmental issues associated with this acquisition during the environmental oversight period we established in DME Construction, as USDOT has suggested. The DME construction project is an independent project that has its own utility and benefits whether or not the instant acquisition goes forward. Because the acquisition transaction and the construction project are separate and distinct — not "two links of a single chain" — the precedent for the proposition that connected actions should be evaluated together in order to avoid segmented or piecemeal environmental review is simply inapposite. See Sylvester v. U.S. Army Corps of Engineers, 884 F.2d 394, 400-01 (9th Cir. 1989), distinguishing Thomas v. Peterson, 753 F.2d 754, 759 (9th Cir. 1985) (Forest Service EIS on logging road required to include analysis of timber sales that would follow from construction of the road).

would need to assess the potential environmental impacts is not yet available, it would be premature to attempt to make that assessment now.[35]

Given the current poor condition of portions of the IMRL lines, IMRL's financial difficulties, and the importance of allowing the acquisition to proceed by the end of July given IC&E's financing arrangements, we need not preclude IC&E from proceeding with the proposed acquisition before we address the likely cumulative impacts of the DME Construction authority together with the proposed acquisition and common control (for which authority will soon be sought). Instead, we will condition IC&E's exercise of this exemption authority so as to preclude IC&E from handling any trains moving to or from the line approved in DME Construction over what are now IMRL lines until we have conducted an appropriate environmental review.[36] We will also impose a condition upon the exercise of this exemption authority requiring that we be notified if and when DME starts construction of the new rail line and that we be provided with information regarding anticipated additional trains handling traffic on the new line that would move on the IMRL lines. Interested members of the public would then have an opportunity to suggest what level of environmental review, if any, they believe may be necessary, and why. After receiving all of this information, we will then be able to determine whether an

[35] The City of Winona, MN, submitted a letter comment stating that the acquisition would result in environmental impacts to the City and asking us to reconsider mitigation that the City had requested in DME Construction. However, the City could not point to any specific actions that would result from this acquisition alone that would adversely affect the environment. At the appropriate time — only after we determine whether IC&E can retain the IMRL assets and whether DME can control IC&E, and then if and when DME is prepared to exercise the authority granted in DME Construction and additional information is available — the City would have an additional opportunity to raise concerns about environmental impacts on Winona that would result from the acquisition, and any need for mitigation to minimize potential environmental impacts.

[36] In its notice, IC&E notes that the IMRL lines currently handle coal to power plants in the Quad Cities and Muscatine, IA. This coal traffic is not affected by our condition, as it is existing traffic, not new traffic to or from the line approved in DME Construction. An existing railroad can ordinarily increase its level of operations without coming to us, and without limitation. See, e.g., Lee's Summit, Missouri v. STB, 231 F.3d 39, 42-43 n. 3 (D.C. Cir. 2000); Detroit/Wayne County Port Auth. v. ICC, 59 F.3d 1314, 1316-17 (D.C. Cir. 1995); Union Pacific Railroad Company — Petition for Declaratory Order — Rehabilitation of Missouri-Kansas-Texas Railroad Between Jude and Ogden Junction, TX, STB Finance Docket No. 33611 (STB served Aug. 21, 1998).

environmental review analyzing the potential environmental impacts of adding this traffic to the IMRL lines would be warranted, and, if so, what type of environmental document to prepare.[37]

This approach is reasonable and meets the requirements of NEPA. As discussed above, the record here shows that there would not be significant potential environmental impacts from the acquisition standing alone, and that the only potential significant impacts, if any, would result from the cumulative effects of handling traffic to and from DME's new line over what are now the IMRL lines. Therefore, the environmental status quo will essentially be preserved unless and until DME, if authorized to control IC&E, constructs its new line and persuades us to lift the traffic restrictions we are imposing here. Only then could DME route over IMRL lines traffic to and from the new line to be constructed into the Powder River Basin.[38] The conditions we are imposing now assure that any cumulative environmental impacts would be addressed before any such expanded operations could take place.[39]

In conclusion, we emphasize that, by allowing the acquisition to proceed, as conditioned to preserve the environmental status quo, we are not prejudging the merits of the pending petitions to revoke the exemption authority for this acquisition or the merits of the forthcoming application of DME for common control. We simply find that it is in the public interest to allow this transaction to take place and thereby ensure uninterrupted service to IMRL's shippers, and with it jobs for IMRL's employees, while the issues raised in the petitions to revoke (or that may be raised in connection with the request for common control of DME and IC&E) are debated and considered. On the basis of what has thus

[37] Regardless of whether an EA or an EIS were prepared, SEA would make its environmental document and its recommended mitigation available for public review and comment.

[38] The courts have recognized that there is no violation of NEPA where proposed actions would not effect a change in the status quo. See Sierra Club v. FERC, 754 F.2d 1506, 1509-10 (9th Cir. 1985).

[39] We note that the courts have rejected arguments that NEPA demands the formulation and adoption of a plan that will fully mitigate environmental harm before an agency can act. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 352-53 (1989); Kleppe v. Sierra Club, 427 U.S. 390, 410 n.20 (1976); Public Utilities Comm'n of California v. FERC, 900 F.2d 269, 282-83 (D.C. Cir. 1990). Furthermore, NEPA "does not require agencies to adopt any particular internal decisionmaking structure." Baltimore Gas & Electric Co. v. NRDC, 462 U.S. 87, 100 (1983). It is well settled that NEPA does not repeal other statutes by implication and that, if the agency meets NEPA's basic requirements, it may fashion its own procedural rules to discharge its multitudinous duties. Vermont Yankee v. NRDC, 435 U.S. 519 (1978); United States v. SCRAP, 412 U.S. 669, 694 (1973).

far been presented, it appears that a stay could degrade service and job opportunities, which would not be in the public interest. However, as previously indicated, we will address those issues in due course and take whatever action may be shown to be appropriate.

It is ordered:

1. The petitions to stay the exemption are denied. The housekeeping stay entered on June 26, 2002 is removed.

2. IC&E is precluded from handling any trains moving to or from the line approved for new construction in DME Construction over what are now IMRL lines until we have conducted any appropriate environmental review and issued a further decision permitting such operations.

3. If DME is subsequently authorized to control IC&E, to allow the Board to meet its obligations under the environmental laws, the Board must be notified if and when DME starts construction of the new line, and the Board must be provided with information regarding anticipated additional trains handling traffic on the new line that would move on the IMRL lines.

4. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Burkes.

Vernon A. Williams
Secretary

33310
EB

SERVICE DATE - FEBRUARY 3, 2003

SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 34178[1]

DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION
AND CEDAR AMERICAN RAIL HOLDINGS, INC.
— CONTROL —
IOWA, CHICAGO & EASTERN RAILROAD CORPORATION

Decision No. 7

Decided: January 31, 2003

The Board approves the acquisition, by Dakota, Minnesota & Eastern Railroad Corporation, of control of Iowa, Chicago & Eastern Railroad Corporation.

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[1] This decision embraces: STB Finance Docket No. 34178 (Sub-No. 1), Dakota, Minnesota & Eastern Railroad Corporation — Terminal Trackage Rights — Union Pacific Railroad Company; and STB Finance Docket No. 34178 (Sub-No. 2), Dakota, Minnesota & Eastern Railroad Corporation — Trackage Rights Exemption — Iowa, Chicago & Eastern Railroad Corporation and Iowa Northern Railway Company.

INTRODUCTION[2]

The DM&E/IC&E Control Application. By application filed August 29, 2002, Dakota, Minnesota & Eastern Railroad Corporation (DM&E, a Class II railroad),[3] Cedar American Rail Holdings, Inc. (Holdings, a noncarrier and a wholly owned subsidiary of DM&E), and Iowa, Chicago

[2] Abbreviations and acronyms used in this decision are listed in Appendix A.

[3] Our regulations divide railroads into three classes based on annual carrier operating revenues. Class I railroads are those with annual carrier operating revenues of $250 million or more (in 1991 dollars); Class II railroads are those with annual carrier operating revenues of more than $20 million but less than $250 million (in 1991 dollars); and Class III railroads are those with annual carrier operating revenues of $20 million or less (in 1991 dollars). See 49 CFR Part 1201, General Instruction 1-1(a).

& Eastern Railroad Corporation (IC&E, a Class II railroad)[4] seek approval under 49 U.S.C. 11321-26 for DM&E's acquisition of indirect control of IC&E through ownership of IC&E's stock by Holdings.[5]

Two Related Filings. By application filed August 29, 2002, DM&E seeks, contingent upon approval of the DM&E/IC&E control application, an order under 49 U.S.C. 11102 that would permit DM&E to operate, without restriction, over approximately 3,700 feet of Union Pacific Railroad Company (UP) "terminal trackage" in Owatonna, MN.[6] By notice of exemption filed August 29, 2002, DM&E seeks, contingent upon approval of the DM&E/IC&E control application and the DM&E/UP terminal trackage rights application, overhead trackage rights on the IC&E line between Owatonna, MN, and Mason City, IA, and on the Iowa Northern Railway Company (IANR) line between Plymouth Junction, IA, and Nora Springs, IA.[7]

Parties Supporting The DM&E/IC&E Control Application. The DM&E/IC&E control transaction is supported by 24 parties, including 15 agricultural interests,[8] 3 railroads,[9] and 6 other

[4] DM&E, Holdings, and IC&E are referred to collectively as applicants.

[5] The proposed control transaction is classified as a minor transaction. See 49 CFR 1180.2(c) (classification of transactions under 49 U.S.C. 11323).

[6] The DM&E/UP terminal trackage rights application is docketed as STB Finance Docket No. 34178 (Sub-No. 1).

[7] The DM&E/IC&E-IANR trackage rights exemption notice is docketed as STB Finance Docket No. 34178 (Sub-No. 2).

[8] Ag Processing Inc., AgFirst Farmers Cooperative, Cenex Harvest States Cooperatives, Farmers Cooperative Association of Jackson, Harrold Grain Company, LLC, Minnesota Grain and Feed Association, National Farmers Union, Oahe Grain Corporation, South Dakota Farm Bureau, South Dakota Farmers Union, South Dakota Grain & Feed Association, South Dakota Soybean Processors, Inc., Watonwan Farm Service Company, Agriliance, LLC, and Grain Processing Corporation.

[9] IANR, Iowa Traction Railroad Company (IATR), and Wisconsin & Southern Railroad Company (W&S).

parties.[10] See DME-2 at 111-49; DME-9 at 38-56; Letter of South Dakota Governor William J. Janklow, dated December 12, 2002.

Parties Supporting The Terminal Trackage Rights Application. The terminal trackage rights application is supported by 9 parties. See DME-9 at 38-56; Letter of South Dakota Governor William J. Janklow, dated December 12, 2002.[11] We have also received a number of letters from Members of Congress supporting the terminal trackage rights application.

Commenting Parties: DM&E/IC&E Common Control. Submissions were filed by Arkansas Electric Cooperative Corporation (AECC), Muscatine Power and Water Company (MP&W), the Western Coal Traffic League (WCTL), MidAmerican Energy Company (MidAmerican), Soo Line Railroad Company d/b/a Canadian Pacific Railway (CPR), the Commuter Rail Division of the Regional Transportation Authority of Northeast Illinois d/b/a Metra (Metra), the Brotherhood of Locomotive Engineers (BLE), the Iowa Department of Transportation (IDOT), and the United States Department of Transportation (DOT). The evidence, arguments, and requests for affirmative relief in these submissions are summarized in Appendix B.

Commenting Parties: Terminal Trackage Rights. Submissions were filed by UP, WCTL, the City of Owatonna, IDOT, and DOT. The evidence and arguments in these submissions are summarized in Appendix C.

Summary Of Decision. In this decision, we are approving DM&E's acquisition of control of IC&E, subject to the standard New York Dock labor protective conditions.[12] We are also denying DM&E's terminal trackage rights application in the Sub-No. 1 docket. Further, we are exempting the DM&E/IC&E-IANR trackage rights at issue in the Sub-No. 2 docket, subject to the standard Norfolk

[10] Greater Huron Development Corporation, IPSCO Steel Inc., the Southern Grainbelt Shippers Association, the Iowa/Minnesota Shippers Association, the City of Jackson, MN, and South Dakota Governor William J. Janklow.

[11] The supporting parties are the Minnesota Department of Transportation, Southern Grainbelt Shippers Association, South Dakota Grain & Feed Association, Iowa/Minnesota Shippers Association, Agriliance, LLC, IPSCO Steel Inc., Grain Processing Corporation, the City of Jackson, MN, and South Dakota Governor William J. Janklow.

[12] New York Dock Ry. — Control — Brooklyn Eastern Dist., 360 I.C.C. 60, 84-90 (1979) (New York Dock).

and Western labor protective conditions.[13] We are denying all other conditions sought by the various parties to this proceeding.

THE DM&E/IC&E CONTROL APPLICATION AND THE RELATED FILINGS

Dakota, Minnesota & Eastern Railroad Corporation. DM&E owns or operates approximately 1,103 route miles of rail lines (including approximately 720 route miles of main lines and approximately 383 route miles of branch lines) in Wyoming, South Dakota, Nebraska, Minnesota, and Iowa. DM&E's principal route extends from Colony (Bentonite), WY, through Rapid City, SD, to Winona, MN. Branch lines extend from Rapid City to Crawford, NE, and Chadron, NE; from Blunt, SD, to Onida, SD; from Wolsey, SD, to Aberdeen, SD, via trackage rights on The Burlington Northern and Santa Fe Railway Company (BNSF); from Redfield, SD, to Mansfield, SD; from Waseca, MN, to Hartland, MN; and from Hartland, MN, to Mason City, IA, via trackage rights on UP.[14] DM&E also has a currently inactive branch line extending from Huron, SD, to Yale, SD, and currently inactive trackage rights on BNSF extending from Yale, SD, to Watertown, SD. In addition, DM&E operates via trackage rights over CPR between Minnesota City, MN, and Winona, MN, and over short segments of UP-owned trackage in Mankato, Owatonna, and Winona, MN.

DM&E's principal yard and terminal facilities are located at Rapid City, Pierre, and Huron, SD, and at Tracy and Waseca, MN. DM&E interchanges traffic with UP at Mankato and Winona, MN, and at Mason City, IA; with CPR at Minnesota City, MN; with BNSF at Wolsey, Aberdeen, and Redfield, SD, and at Crawford, NE; and with Nebkota Railway, Inc., at Chadron, NE. DM&E can also conduct, via its overhead trackage rights on UP's Hartland-Mason City line, restricted interchanges with CEDR at Glenville, MN, and with IANR at Manly, IA.[15] Although the lines of DM&E and IC&E cross at grade and connect in Owatonna, MN, DM&E and IC&E cannot (for the

[13] Norfolk and Western Ry. Co. — Trackage Rights — BN, 354 I.C.C. 605, 610-15 (1978) (Norfolk and Western), as modified in Mendocino Coast Ry., Inc. — Lease and Operate, 360 I.C.C. 653, 664 (1980) (Mendocino Coast).

[14] DM&E's Hartland-Mason City trackage rights are restricted to interchanging traffic with UP at Mason City and to interchanging limited categories of traffic with IANR at Manly, IA, and with Cedar River Railroad Company (CEDR, a Canadian National Railway Company (CN) subsidiary) at Glenville, MN.

[15] The DM&E/CEDR interchange at Glenville is limited to traffic that originates or terminates at points on CEDR's lines. The DM&E/IANR interchange at Manly is limited to traffic that originates or terminates at points (other than Cedar Rapids, IA) on IANR's lines.

most part) interchange at that location due to restrictions on DM&E's trackage rights on the UP-owned track through Owatonna.

Iowa, Chicago & Eastern Railroad Corporation. IC&E owns or operates approximately 1,397 route miles of rail lines (including approximately 786 route miles of main lines and approximately 611 route miles of secondary or branch lines) in Minnesota, Iowa, Kansas, Missouri, Wisconsin, and Illinois. IC&E, which acquired these lines on July 29, 2002, from I&M Rail Link, LLC (I&M), in an asset acquisition transaction,[16] began its operations on these lines on July 30, 2002. IC&E's principal routes extend from Chicago, IL, to Sabula Junction, IA, and from there both southwest to Kansas City, MO, and northwest to Minneapolis/St. Paul, MN. Significant secondary routes — known as the Corn Lines — extend across Southern Minnesota from Jackson, MN, to Ramsey, MN, and across Northern Iowa from Sheldon, IA to Marquette, IA. Branch lines extend from Davis Junction, IL, through Rockford, IL, and Beloit, WI, to Janesville, WI; from Mason City, IA, to Comus, MN;[17] from Wells, MN, to Minnesota Lake, MN; from Davenport, IA, to Albany, IL, via trackage rights on BNSF; and from Davenport, IA, to Eldridge, IA. IC&E has overhead trackage rights over other railroads at a number of locations, including over CPR between River Junction, MN, and Merriam Park, MN, and between Comus, MN, and Rosemount, MN;[18] over IANR between Nora Springs, IA, and Plymouth Junction, IA (connecting two IC&E line segments); and over Metra's "West Line" between Pingree Grove, IL, and Cragin Junction in Chicago, IL.[19]

IC&E's principal yard and terminal facilities are located at Davenport, IA, Ottumwa, IA, Muscatine, IA, Marquette, IA, Mason City, IA, West Davenport, IA, Savanna, IL, and Davis Junction, IL. IC&E owns a non-controlling stock interest in the Kansas City Terminal Railway

[16] See Iowa, Chicago & Eastern Railroad Corporation — Acquisition and Operation Exemption — Lines of I&M Rail Link, LLC, STB Finance Docket No. 34177 (STB served June 12, 2002, June 26, 2002, July 22, 2002, and January 21, 2003) (IC&E/I&M Asset Acquisition).

[17] The Faribault, MN-Comus, MN segment of the Mason City, IA-Comus, MN line is not currently in service.

[18] The Comus-Rosemount trackage rights are not currently in use.

[19] Applicants claim that IC&E acquired, as assignee from I&M, I&M's rights to use Metra's West Line. This claim, however, has been the subject of a dispute between IC&E and Metra, and, in view of Metra's initial refusal to allow IC&E to access the West Line, IC&E traffic to/from Chicago was initially handled by other railroads — Iowa Interstate Railroad Ltd. (IAIS) and Chicago, Central & Pacific Railroad Company (CC&P, a CN subsidiary) — pursuant to haulage arrangements. Applicants have advised that IC&E commenced operations over the West Line in early September 2002 pursuant to a "temporary detour agreement" between IC&E and Metra, and that IC&E's alternative access routes via IAIS and CC&P also remain in place. See DME-9 at 5 n.7.

Company (KCT, a switching and terminal carrier in Kansas City, KS/MO), and is also a joint owner, with The Kansas City Southern Railway Company (KCS), of the "Joint Agency" yard facility in Kansas City, MO. IC&E interchanges traffic with The Belt Railway Company of Chicago (BRC) at Cragin Junction/Clearing, IL; with BNSF at East Moline, IL, Moline, IL, Bettendorf, IA, Ottumwa, IA, Minneapolis/St. Paul, MN, and Kansas City, MO; with CEDR at Charles City, IA, and Lyle, MN; with CC&P at Dubuque, IA, and Rockford, IL; with the Chillicothe-Brunswick Rail Authority (CBRA) at Chillicothe, MO; with the Elgin, Joliet & Eastern Railway Company (EJ&E) at Spaulding, IL; with Illinois RailNet, Inc. (IRN), at Davis Junction, IL; with the Indiana Harbor Belt Railroad Company (IHB) at Franklin Park, IL; with IAIS at Rock Island, IL, and Davenport, IA; with IANR at Nora Springs, IA, and Plymouth Junction, IA; with IATR at Mason City, IA; with KCS at Kansas City, MO; with the Minnesota Commercial Railway Company (MCRC) at Minneapolis/St. Paul, MN; with Norfolk Southern Railway Company (NS) at Birmingham, MO, and Kansas City, MO; with CPR at Bensenville, IL, Minneapolis/St. Paul, MN, Northfield, MN, and River Junction, MN; with UP at Clinton, IA, Emmetsburg, IA, Mason City, IA, Sheldon, IA, Minneapolis/St. Paul, MN, Kansas City, MO, and Janesville, WI; and with W&S at Janesville, WI. IC&E also interchanges with all major line-haul carriers at Chicago, through intermediate switching services provided by BRC, IHB, and CPR.[20]

Cedar American Rail Holdings. Holdings is the beneficial owner of all of the outstanding common stock of IC&E, which is being held in an independent voting trust pending the outcome of this control proceeding. Applicants indicate that, if the control application is approved and consummated, Holdings will function as a holding company for both DM&E and IC&E (i.e., Holdings will oversee the management and coordination of operations on the DM&E/IC&E system and perform marketing and administrative services for both DM&E and IC&E).[21]

Nature of the Control Transaction. Applicants contemplate the acquisition, by DM&E, of indirect control of IC&E through the termination of the voting trust in which the IC&E stock is currently held and the distribution of that stock to Holdings, which will allow Holdings to exercise control over the IC&E stock. Applicants indicate that, if and when control is consummated, Holdings will oversee the management and coordination of operations of DM&E and IC&E, which will remain separate entities and conduct their own operations with their own employees.

[20] IC&E's overhead traffic rights on CPR's River Junction-Twin Cities line do not allow IC&E to interchange with DM&E at Minnesota City, MN, or Winona, MN, two points at which DM&E lines connect with CPR's line.

[21] DM&E's existing capital structure did not easily allow for the creation of a holding company in the normal corporate chain position above DM&E. Holdings was created as a wholly owned subsidiary of DM&E and technically is positioned in the corporate chain between DM&E and IC&E.

Public Interest Justifications. Applicants contend that common control will improve applicants' operating and financial performance by allowing both railroads to serve their customers more effectively and to compete more effectively in the mid-American transportation market with Class I railroads, motor carriers, and barges. According to applicants, customers on both carriers will benefit from better equipment coordination and utilization, improved service patterns, and other operating efficiencies made possible by the larger and more diversified traffic base and greater financial resources of the combined DM&E/IC&E system. Applicants anticipate that common control will provide a more stable and reliable environment for shippers on both railroads. Applicants further contend that grain shippers on both DM&E and IC&E will benefit from having access to a combined, coordinated system fleet of over 6,100 covered hopper cars, and that common control will provide shippers and receivers with new routing and service options and more efficient and competitive single-system access to significant new markets and gateways.

More specifically, applicants maintain, with respect to DM&E, that common control will give shippers new, single-system rail access to the longer river shipping season at Mississippi River ports south of Winona, MN, and that grain shippers will enjoy, for the first time, direct single-system service to the major rail gateways of Chicago and Kansas City, new single-system routes to major grain processing plants on IC&E, new direct joint-line routes to processors elsewhere in Iowa (such as on IANR in Cedar Rapids), and "neutral" interline access to significant long-haul destination markets in the south-central United States. And common control, applicants maintain, will guarantee that DM&E will have neutral eastern routings for coal movements from the Powder River Basin (PRB) in Wyoming, if and when DM&E constructs its recently-approved line into the PRB.[22]

Applicants maintain, with respect to IC&E, that, after many years of doubt regarding the viability of the rail lines now owned by IC&E, common control will restore the IC&E lines to a stable, reliable, and essential component of the regional rail network in the north-central United States. Grain shippers on IC&E's lines, applicants argue, will gain potential new routes to the Pacific Northwest for export, while grain receivers on IC&E's lines and elsewhere in Iowa will be assured continued reliable, independent, and long-term access to grain from origins both on IC&E's Corn Lines and on DM&E's lines in southern Minnesota and South Dakota. And, applicants assert, IC&E's largest customer, a steel manufacturing firm near Davenport, IA, will have single-system service for inbound scrap that currently originates on DM&E but must now be interchanged to an intermediate carrier for interchange to IC&E.

[22] See Dakota, Minnesota & Eastern Railroad Corporation Construction Into The Powder River Basin, STB Finance Docket No. 33407 (STB served Jan. 30, 2002) (PRB Construction), pet. for judicial review pending sub nom. Mid States Coalition for Progress et al. v. Surface Transportation Board et al., No. 02-1359 et al. (8th Cir. filed Feb. 7, 2002).

Applicants further contend that the proposed control transaction is completely "end-to-end" and will have no adverse impact on competition. According to applicants, DM&E and IC&E serve no common industries today and do not currently interchange traffic at any location,[23] and, therefore, common control will not result in any reduction in existing rail-to-rail competition at any point or in any market. Applicants state that no shipper will lose competitive rail service or access to any existing routing options; that common control will have no adverse impact on the continuation of essential transportation services by DM&E, IC&E, or by any other railroad; and that diversion of traffic from other railroads will be minimal.[24]

Environmental Considerations. Applicants contend that, under 49 CFR 1105.6(c)(2)(i), the DM&E/IC&E common control proposal is exempt from environmental reporting requirements because common control will not result in changes in carrier operations that will exceed the thresholds established in 49 CFR 1105.7(e)(4) or (5). Applicants anticipate that common control will result in only a minor increase (no more than several trains per week) in traffic over IC&E's rail line between Owatonna, MN, and Mason City, IA. They state that this increase will be offset by a roughly corresponding decrease in train operations over DM&E's Waseca, MN-Hartland, MN, line and UP's Hartland, MN-Mason City, IA, line (which includes UP's "Spine Line" route between Albert Lea, MN, and Mason City, IA), and that anticipated traffic increases elsewhere on the combined DM&E/IC&E system will be handled in existing scheduled train movements.

Historic Preservation. Applicants contend that, under 49 CFR 1105.8(b)(1) and (3), the DM&E/IC&E common control proposal is exempt from historic preservation reporting requirements. Applicants explain that rail operations will continue after consummation of common control; that there will not be a substantial change in the level of maintenance of railroad property; that further Board approval will be required to abandon any service; and that there are no plans to dispose of or alter properties subject to Board jurisdiction that are 50 years old or older.

[23] Although the routes operated by DM&E and IC&E intersect at five locations (Albert Lea, MN, Owatonna, MN, Mason City, IA, Minnesota City, MN, and Winona, MN), DM&E and IC&E do not currently interchange traffic at any of these locations, primarily because either DM&E or IC&E operates via restricted trackage rights at each of these locations that will not allow for a DM&E/IC&E interchange. DM&E has not explained its rationale for seeking to establish a DM&E/IC&E connection at Owatonna as opposed to any of the other possible points.

[24] Applicants anticipate that, as a result of common control, approximately 9,850 carloads of traffic will be diverted to the combined DM&E/IC&E system annually, generating annual revenues of approximately $8.1 million. Applicants indicate that, for the most part, these anticipated diversions represent extensions of haul on existing DM&E traffic resulting from shippers favoring the single-system service offerings of the combined DM&E/IC&E.

Labor Protection. Applicants do not anticipate that any existing DM&E or IC&E employees will be adversely affected by DM&E/IC&E common control. Applicants state that the labor protection conditions set forth in New York Dock will adequately protect any adversely affected employees.

Related Filing: Terminal Trackage Rights Application. In STB Finance Docket No. 34178 (Sub-No. 1), DM&E has filed, contingent upon approval of the DM&E/IC&E control proposal, a "terminal trackage rights" application under 49 U.S.C. 11102 that would have us require UP to permit DM&E to operate, without restriction, over approximately 3,700 feet of UP track in Owatonna, MN (extending between approximately MP 88.6 and MP 87.9).[25] DM&E explains that, when it was created in 1986 as a spinoff from the Chicago & North Western Transportation Company (CNW), it acquired from CNW approximately 1,000 miles of rail lines and related trackage rights in South Dakota, Minnesota, and Iowa, extending in a generally west-east direction between Rapid City, SD, and Winona, MN. However, DM&E did not acquire the 2.4-mile segment of the CNW line in Owatonna between approximately MPs 88.6 and 86.2, which included (at approximately MP 87.9) a physical at-grade connection with a north-south CPR line. Rather, for this 2.4-mile segment, DM&E acquired trackage rights that were both exclusive (CNW did not retain the right to operate over the segment) and restricted (DM&E was allowed to use the trackage rights for overhead traffic, and for any DM&E/CPR interchange traffic that originated or terminated either on the 2.4-mile segment or at industries in Owatonna served by CPR and open to reciprocal switching). CNW retained ownership of the 2.4-mile segment and all ancillary trackage in Owatonna. The 2.4-mile segment, DM&E explains, was "carved out" of the DM&E/CNW asset acquisition transaction in order to preclude an unrestricted DM&E/CPR interchange at Owatonna.

DM&E further explains that CNW's ownership interest in the 2.4-mile segment was acquired several years ago by UP; that CPR's (later I&M's) north-south line through Owatonna was recently acquired by IC&E; that the restriction that was created in 1986 continues to exist even though the 2.4-mile segment has not been used by CNW (or UP) since 1986, and even though the 2.4-mile segment now exists as an "island" that is not connected to the rest of the UP system;[26] and that this restriction now precludes the creation of a meaningful DM&E/IC&E connection at Owatonna.

DM&E requests terminal trackage rights over an approximately 0.7-mile portion of the 2.4-mile segment (the portion between approximately MPs 88.6 and 87.9) to establish a direct connection and unrestricted interchange between DM&E and IC&E, which do not presently connect with each other at

[25] DM&E's request is supported by Iowa DOT, Minnesota DOT, the State of South Dakota, the City of Owatonna, and WCTL, among others.

[26] The UP (formerly CNW) north-south "Spine Line" between the Twin Cities and Kansas City passes under the 2.4-mile segment (at approximately MP 88.5) but does not connect with that segment.

any location. DM&E contends that, without such relief, which DOT and UP oppose,[27] DM&E and IC&E would be unable to effectuate efficiently new competitive traffic routings that would otherwise be made possible by the control transaction.

DM&E acknowledges that, in PRB Construction, the Board recently granted DM&E authority to construct, just east of Owatonna, a 1.7-mile "loop" connection between DM&E's west-east line (beginning at a point east of the eastern end of the 2.4-mile segment) and what was then I&M's (and is now IC&E's) north-south line, if it is not able to come to terms with UP for an interchange at MP 87.9. See PRB Construction, slip op. at 19, 41 (DM&E authorized to construct the new 1.7-mile loop, which is referred to as "Alternative O-4,"[28] if it cannot reach an agreement with UP for a DM&E/I&M interchange at MP 87.9, which is referred to as "Alternative O-5"). See also UP-4, Groner v.s., Exhibit 1 (a map depicting the 1.7-mile "Alternative O-4" loop). DM&E argues, however, that, as the Board itself has concluded, see PRB Construction, slip op. at 19, interchange at MP 87.9 would be "environmentally preferable" to construction of the 1.7-mile loop. And, DM&E asserts, given that the only obstacle to interchange at MP 87.9 is a 1986 restriction on its trackage rights operations, construction of the 1.7-mile loop would be unnecessary and wasteful.

DM&E asserts that private negotiations with UP outside the framework of 49 U.S.C. 11102 to obtain a MP 87.9 interchange are not likely to prove fruitful. DM&E further contends that the requested terminal trackage rights satisfy the criteria of 49 U.S.C. 11102(a) and that, although § 11102(a) provides that compensation for use of terminal trackage rights "shall be paid or adequately secured" before a carrier may begin to use such rights, we should not require that the compensation be established before DM&E can begin use of the proposed terminal trackage rights. Such a requirement, DM&E claims, would delay the public benefits of DM&E/IC&E common control.

Related Filing: Trackage Rights Exemption Notice. In STB Finance Docket No. 34178 (Sub-No. 2), DM&E has filed, contingent upon approval of both the DM&E/IC&E control transaction and the requested terminal trackage rights, a notice of exemption pursuant to 49 CFR 1180.2(d)(7) to obtain overhead trackage rights: (1) on the IC&E line between Owatonna, MN (at approximately

[27] DOT maintains that the request for terminal trackage rights does not comport with applicable Board precedent. UP contends that the track in question is not a terminal facility and that the standards of 49 U.S.C. 11102(a) have not been met. Both UP and DOT point out that both parties now have strong incentives, without our interference, to negotiate an agreement allowing DM&E to use the UP-owned trackage in Owatonna for an interchange.

[28] UP acknowledges that the 1986 DM&E/CNW agreement contains no restriction that would prevent DM&E from building the 1.7-mile loop and operating across UP trackage to reach IC&E. See UP-4 at 10 n.5.

MP 101.9), and Mason City, IA (at approximately MP 0.0), a distance of approximately 72.4 miles;[29] and (2) on the IANR line between Plymouth Junction, IA (at approximately MP 219.5), and Nora Springs, IA (at approximately MP 210.7), a distance of approximately 8.8 miles. These overhead trackage rights, which are being sought with the approval of IC&E and IANR, will allow DM&E to interchange traffic with IC&E at Austin, MN, and Mason City, IA; with UP at Mason City, IA; with CEDR at Lyle, MN; and with IANR at Plymouth Junction and Nora Springs, IA. DM&E indicates that the overhead trackage rights will facilitate the effective movement of trains and interchange of traffic between DM&E and IC&E, expand routing and service options with other rail carriers, and reduce trackage rights fees paid to UP in connection with DM&E's existing route to Mason City. DM&E indicates that the applicable level of labor protection for the trackage rights is that set forth in Norfolk and Western, as modified in Mendocino Coast.

DISCUSSION AND CONCLUSIONS

The DM&E/IC&E Control Application: Statutory Criteria. Under 49 U.S.C. 11323(a)(3) and (5), the acquisition of control of a rail carrier by another rail carrier or by a noncarrier that controls another rail carrier requires prior Board approval.[30] The criteria for approval are set forth in 49 U.S.C. 11324. Because the DM&E/IC&E control transaction does not involve the merger or control of two or more Class I railroads,[31] this transaction is governed by § 11324(d), under which we must approve a control application unless we find that: (1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and (2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

In assessing transactions subject to § 11324(d), our primary focus is on the anticipated competitive effects. We must grant the application unless there will be adverse competitive impacts that

[29] At Ramsey, MN (an intermediate point between Owatonna and Mason City), there is a milepost equation at which MP 72.5 = MP 43.0.

[30] Applicants have indicated that, although the form of the DM&E/IC&E control transaction implicates § 11323(a)(3) ("Acquisition of control of a rail carrier by any number of rail carriers."), the substance of the transaction implicates § 11323(a)(5) ("Acquisition of control of a rail carrier by a person [Holdings] that is not a rail carrier but that controls any number of rail carriers.").

[31] In Major Rail Consolidation Procedures, STB Ex Parte No. 582 (Sub-No. 1) (STB served June 11, 2001, and published in the Federal Register on June 15, 2001, at 66 FR 32582), we adopted new regulations for rail consolidation transactions that involve the merger or control of two or more Class I railroads.

are both "likely" and "substantial." And, even if there will be likely and substantial anticompetitive impacts, we may not disapprove the transaction unless the anticompetitive impacts outweigh the benefits and cannot be mitigated through conditions.[32] See Canadian National Railway Company, Grand Trunk Corporation, and WC Merger Sub, Inc. — Control — Wisconsin Central Transportation Corporation, Wisconsin Central Ltd., Fox Valley & Western Ltd., Sault Ste. Marie Bridge Company, and Wisconsin Chicago Link Ltd., STB Finance Docket No. 34000, Dec. No. 10 (STB served Sept. 7, 2001), slip op. at 10 (CN/WC); Kansas City Southern Industries, Inc., KCS Transportation Company, and The Kansas City Southern Railway Company — Control — Gateway Western Railway Company and Gateway Eastern Railway Company, STB Finance Docket No. 33311 (STB served May 1, 1997), slip op. at 4; CSX Corporation and CSX Transportation, Inc. — Control — The Indiana Rail Road Company, STB Finance Docket No. 32892 (STB served Nov. 7, 1996), slip op. at 3-4.

The DM&E/IC&E Control Application: General Competitive Analysis. The evidence demonstrates that the DM&E/IC&E control transaction will cause no harm to competition. DM&E and IC&E serve no common industries and do not currently interchange traffic at any location, and, therefore, common control will not result in any reduction in existing rail-to-rail competition at any point or in any market. No shipper will suffer a direct merger-related loss of competitive rail service.

Turning to indirect competition, we examine the effect of the proposed control transaction on geographic competition, when two carriers transport the same product to the same destination but from different origins, or conversely when two carriers transport the same product from the same origin to two different destinations. No party has suggested that there will be a reduction in geographic competition as a result of DM&E/IC&E common control. Thus, based on the record, we find that the DM&E/IC&E control transaction will not lead to a reduction in geographic competition.

Finally, we consider whether common control will increase DM&E's or IC&E's market power. The combined DM&E/IC&E system will face intense competition from the large Class I rail systems that will surround it. Moreover, as noted above, no shipper will face a reduction in the number of railroads serving any of its facilities, and no reduction in geographic competition is expected. Accordingly, we find that the DM&E/IC&E control transaction will not result in any increase in either carrier's market power. We approve the DM&E/IC&E control application because the evidence demonstrates that there is not likely to be either a substantial lessening of competition, the creation of a

[32] Under 49 U.S.C. 11324(c), we have broad authority to place conditions on our approval of § 11323 transactions.

monopoly, or a restraint of trade in freight surface transportation in any region of the United States as a result of the control transaction.[33]

The evidence further demonstrates that this essentially end-to-end transaction will benefit shippers by enabling both railroads to compete more effectively against their Class I rail competitors, as well as motor carrier and barge competition. Shippers on the DM&E/IC&E system will benefit from the better equipment coordination and utilization, improved service patterns, and other operating efficiencies made possible by common control. Common control also will give shippers on both DM&E and IC&E new routing and service options and more efficient and competitive single-system access to significant new markets and gateways. These beneficial effects for shippers provide additional support for approval of the DM&E/IC&E control transaction.

The DM&E/IC&E Control Application: Relief Sought By AECC. AECC asks that we impose relief to preserve both: (1) the competitive options that DM&E will be able to provide if and when it constructs its recently-approved PRB line, which will be oriented to coal receivers in the north-central United States; and (2) the competitive options that an independent I&M could have provided in conjunction with AECC's plans for an alternative routing for PRB coal that would be oriented to coal receivers in the south-central United States.[34] For the reasons given below, we are denying the relief requested by AECC.

(1) *Relief Respecting The Competitive Options That DM&E Itself Will Be Able To Provide.* AECC contends that the viability of DM&E's PRB line has been called into question by recent developments (which, AECC claims, suggest that DM&E's PRB revenues are likely to be lower than originally projected) and by the IC&E/I&M asset acquisition (which, AECC claims, may itself adversely affect prospects for DM&E's PRB construction project). AECC therefore asks that we require DM&E to submit evidence regarding the status of its financing for PRB Construction; identify remedial measures for the alleged adverse cross-over effects that the IC&E/I&M asset acquisition may have on the PRB construction project; and demonstrate that IC&E's access to Chicago and other relevant points over former I&M lines has not been compromised.

AECC is arguing, in large part, that we may have erred when we authorized DM&E to build in PRB Construction. But we will not permit AECC to use this proceeding to relitigate PRB Construction. As noted by DOT, we approved PRB Construction after a thorough consideration of all aspects of the proposal, including financial viability. Further, because our approval of construction of

[33] As discussed below, we have found no merit to the competitive concerns raised by AECC and CPR and have rejected their requests for conditions.

[34] AECC's request that we impose relief intended to preserve the competitive options that an independent I&M could have provided has been supported in principle by WCTL.

DM&E's PRB line was merely permissive, we agree with DOT that it is not particularly pertinent whether DM&E/IC&E common control makes construction of that line more or less likely. Rather, as DOT points out, that is a question for DM&E's potential investors and financial supporters. What is important in the control proceeding before us here is whether the combination of DM&E and IC&E will affect the ability of these carriers to meet their common carrier obligations and provide essential services. As indicated, applicants have shown that common control will produce a stronger rail system that will be better able to offer improved services to their existing shippers. No party (including AECC) has introduced persuasive evidence to the contrary.[35]

(2) *Relief Respecting The Competitive Options That An Independent I&M Could Have Provided.* AECC evidently contemplates seeking authority to construct a fourth line (the first three would be BNSF's, UP's, and DM&E's) into the PRB. This fourth line would apparently require the restoration of the CNW "Cowboy Line" across northern Nebraska, and the construction of extensions west to the PRB and south to Kansas City. AECC explains that, because a large volume of the traffic projected to move via the new Cowboy Line would have to be interchanged at Kansas City with IC&E, the new line would require a neutral IC&E connection at Kansas City. And the availability of this neutral connection, AECC contends, has been threatened in two separate ways. First, AECC contends, the extent of a physical IC&E connection at Kansas City has been called into question by actions taken by CPR. Second, AECC contends, the existence of a neutral IC&E connection is threatened by DM&E's interest in protecting its ability to build its own PRB line. According to AECC, DM&E apparently believes that it will be most likely to realize a return on the substantial investment it has already sunk into its own PRB project if it can prevent others from establishing a new PRB service.

AECC therefore argues that we should require DM&E to demonstrate that the terms of I&M's former access to Kansas City have not been compromised in a manner that would hinder competitiveness for volume coal movements. In addition, AECC asks that we require applicants to provide, to any new rail carrier serving the PRB, access (particularly at Kansas City) to the lines formerly operated by I&M, on nondiscriminatory terms and conditions.

We will not grant the relief sought by AECC. Applicants will have incentives of their own to do whatever can be done to ensure that IC&E has broad access to Kansas City. Moreover, we will not burden an otherwise procompetitive transaction by placing restrictions on the terms and conditions under which applicants may choose to interchange with an as-of-now purely hypothetical entrant into the PRB.

[35] Indeed, as DOT notes, the prospect of a stronger, more financially stable DM&E/IC&E would not seem to undercut the likelihood that the line approved in PRB Construction will be built, even if that were a significant issue in this proceeding.

The DM&E/IC&E Control Application: Relief Sought By CPR. CPR has raised issues involving: (1) the Minnesota City gateway; and (2) Metra's West Line. For the reasons given below, we are denying the relief requested by CPR.

(1) *The Minnesota City Gateway.* CPR is concerned that a commonly controlled DM&E/IC&E will favor DM&E-IC&E routings via Owatonna and will discriminate against DM&E-CPR routings via Minnesota City. CPR therefore asks that we impose a condition that would require the combined DM&E/IC&E to keep the Minnesota City gateway open for "interline division interchange traffic." CPR contends that this would give shippers more choices for their grain movements and provide "short haul" advantages for potential PRB coal movements to Minnesota and Wisconsin plants.

We will not grant the "open gateway" condition sought by CPR. The condition would disadvantage the combined DM&E/IC&E from routing traffic via the Owatonna gateway even if doing so were more efficient than a DM&E-CPR routing via Minnesota City. The shipping public will benefit if the combined DM&E/IC&E has the flexibility to operate via its most efficient routings. We do not share CPR's apparent concern that a combined DM&E/IC&E will tend to favor a "long-haul" DM&E-IC&E routing that is less efficient than a "short-haul" DM&E-CPR routing. The competitive pressures that DM&E/IC&E will face from, among others, BNSF and UP will be such that any effort to use an inefficient "long-haul" routing will risk the competitive loss of the traffic.

(2) *Metra's West Line.* Metra, which owns the "West Line" into Chicago, has disputed DM&E's claim that IC&E acquired I&M's trackage rights over the West Line. Initially, in view of Metra's refusal to allow IC&E to access the West Line, IC&E traffic to/from Chicago was handled by IAIS and CC&P pursuant to haulage arrangements. Later, IC&E and Metra negotiated a "temporary detour agreement" pursuant to which IC&E can operate over the West Line. The dispute between DM&E and Metra remains the subject of negotiations, and neither DM&E/IC&E nor Metra has asked us to take any action respecting this matter. Metra, in fact, has advised that it is optimistic that the negotiations will address its concerns, and that it now believes that it is in a position to protect its interests in any event.[36]

CPR is not as optimistic about the outcome of these negotiations and raises concerns that, if negotiations fail, future litigation could have unspecified "implications" for shippers, the freight railroads, and Metra.[37] CPR has shown that potential issues regarding IC&E's access to Chicago over the

[36] Metra accordingly does not oppose the common control transaction.

[37] While the precise nature of CPR's interest in this matter is not entirely clear, it appears that CPR, which formerly owned the rail lines now owned by IC&E and which had a minority ownership (continued...)

West Line could arise, but, as DOT has said, no party has demonstrated that any action by us regarding access to Chicago (over the West Line or generally) is warranted now, when the parties are still in the process of negotiating an arrangement for use of the West Line, and DM&E coal traffic from the PRB reaching Chicago (via the Metra line or any other line) has not yet begun.

The DM&E/IC&E Control Application: Labor Protection. Under 49 U.S.C. 11326 (with exceptions not pertinent here), the imposition of labor protection is mandatory when approval is sought for a transaction under §§ 11324 and 11325. In the absence of a need for greater protection, the New York Dock conditions are appropriate for this type of transaction. Because no need for greater protection has been shown here,[38] these conditions will be imposed.[39]

The DM&E/UP Terminal Trackage Rights Application. Applicants' systems meet in Owatonna, MN, but the carriers cannot interchange traffic or otherwise connect at that point because of restrictions on DM&E's use of track owned by UP. As discussed above, these restraints date from DM&E's creation, when, in return for a more favorable sales price, DM&E agreed that UP's predecessor would part only with overhead trackage rights on its line through Owatonna. The result was, and is, a 2.4-mile "island" of track in Owatonna owned by UP but unconnected to the rest of the UP system. Pursuant to 49 U.S.C. 11102(a),[40] applicants have requested terminal trackage rights on approximately 3700 feet of this island of track to enable DM&E to connect and interchange traffic with IC&E at Owatonna. Applicants claim that, without the terminal trackage rights, the combined DM&E

[37](...continued)
interest in I&M, has its own (undisputed) West Line trackage rights and is also a guarantor of certain long-term contracts that have been assumed by IC&E. CPR advises, in this regard, that, in view of a contractual arrangement that could require CPR to make certain IC&E payments to Metra if IC&E falters financially, CPR has an interest in assuring that IC&E operates successfully over the West Line.

[38] There is no allegation that rail employees will be adversely affected by the control transaction.

[39] BLE, a railway labor organization, contends, in essence, that the DM&E/IC&E control transaction and the IC&E/I&M Asset Acquisition transaction are, in reality, a single transaction (i.e., the acquisition, by DM&E, of control of I&M) and should therefore be treated as such. This argument has already been considered and rejected. See the IC&E/I&M Asset Acquisition decisions served July 30, 2002, and January 21, 2003.

[40] Under 49 U.S.C. 11102(a), we may require a railroad to allow its "terminal facilities, including main-line tracks for a reasonable distance outside the terminal," to be used by another railroad if the use is practicable, in the public interest, and will not substantially impair the ability of the owning railroad to handle its own traffic.

/IC&E will not be able to effectuate the new competitive routings that would otherwise be made possible by the control transaction.

We disagree that terminal trackage rights are necessary or appropriate to provide the full benefits of common control. The parties here have incentives to negotiate an agreement under which DM&E would be permitted to connect with IC&E via existing UP trackage in Owatonna—the same result that would be achieved if terminal trackage rights were granted. In PRB Construction, DM&E recently obtained authority to construct, just east of Owatonna, a new 1.7-mile connection, if DM&E and UP cannot reach a negotiated agreement to remove the restrictions on DM&E's use of the 2.4-mile UP-owned line through Owatonna. As DOT and the City of Owatonna note, use of the existing line would be environmentally preferable to construction of the new route. But the fact that DM&E already has the authority to build a connection with IC&E at Owatonna makes it likely that DM&E and UP will negotiate an agreement granting DM&E the additional rights it needs to connect with IC&E via existing UP trackage, in which case the new connection will never be built. UP knows that DM&E could build the new connection, in which case UP would gain nothing. It is therefore in UP's interest to reach agreement with DM&E so that UP receives some consideration. DM&E, on the other hand, knows that an agreement with UP would save it the cost of building a new connection. DM&E also believes that any delay in reaching an agreement with UP would delay many of the benefits associated with this transaction. It therefore has a very strong incentive to reach an agreement under which it pays UP some amount less than the cost of construction.

Applicants argue that private negotiations are not likely to succeed because the restrictions on DM&E's ability to interchange traffic at Owatonna have existed for the past 16 years without significant change. But until PRB Construction was decided in January 2002, DM&E did not have the leverage now provided by its authority to construct the new connection. Moreover, as UP points out (UP-4 at 12, Exh. 6 at 29-30), in PRB Construction DM&E was considerably more optimistic that a mutually satisfactory arrangement with UP would be negotiated. Indeed, in 2001, in comments on the Draft Environmental Impact Statement prepared in PRB Construction (reproduced at UP-4, Exh. 6 at 29), DM&E specifically stated that "the common sense result of [approval of the new 1.7-mile connection] would be to facilitate a private agreement between the two railroads which would obviate the need for its ultimate construction." DM&E explained that it intended to build the new connection only "if for inexplicable reasons" it was unable to come to terms with UP, and stated that it did not believe the new construction was "either necessary or likely." Id. DM&E further noted (id. at 29-30): "Common sense will prevail. DM&E has a good, positive working relationship with UP and this is a straight-forward business issue. UP can and should expect reasonable compensation in reaching an agreement, and the cost of constructing [a new connection] provides all the common sense incentive in the world for both parties to take the logical path of a negotiated agreement."

In these circumstances, the real reason for the terminal trackage rights application appears to be that the price DM&E will pay would be established by us rather than through negotiations with UP. But our policy has long been to encourage private sector dispute resolution whenever possible,

particularly in disputes involving compensation.[41] Accordingly, our involvement in how much money DM&E should pay UP to use its track—instead of the nearby new connection authorized in PRB Construction—is simply inappropriate.[42]

We believe this matter must be resolved by the parties and we urge the parties to quickly resolve this issue. Because the record contains letters from many states, groups and political officials who believe that a prolonged delay in reaching an agreement would delay many of the benefits associated with the transaction, we will require the parties to report back to the Board on the status of their negotiations within 60 days of the service date of this decision.

In short, there is no basis for imposing terminal trackage rights here. Therefore, the request for terminal trackage rights will be denied.[43]

The DM&E/IC&E-IANR Trackage Rights Exemption Notice. In STB Finance Docket No. 34178 (Sub-No. 2), DM&E has filed a notice of exemption pursuant to 49 CFR 1180.2(d)(7) to obtain overhead trackage rights on the IC&E line between Owatonna, MN, and Mason City, IA, and on the IANR line between Plymouth Junction, IA, and Nora Springs, IA. These trackage rights are intended to facilitate the effective movement of trains and interchange of traffic between DM&E and IC&E, to expand routing and service options with other rail carriers, and to reduce trackage rights fees paid to UP in connection with DM&E's existing route to Mason City.

We will allow the notice of exemption to take effect on the effective date of this decision, even though DM&E indicated that these trackage rights are intended to be contingent upon approval of both the DM&E/IC&E control transaction and the terminal trackage rights application. We are taking this action because we are convinced that, one way or another, there will be, in the not too distant future, a

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[41] See Canadian National Ry., Grand Trunk Corp. & Grand Trunk Western R.R.—Control— Illinois Central Corp., Illinois Central R.R., Chicago, Central & Pacific R.R. & Cedar River R.R., STB Finance Docket No. 33556 (STB served May 25, 1999) (CN/IC), slip op. at 53; San Jacinto Rail Ltd.—Construction Exemption, STB Finance Docket No. 34079 (STB served July 19, 2002), slip op. at 6 n.5.

[42] The parties supporting the imposition of terminal trackage rights here have cited various cases as precedent, but all of these cases are distinguishable.

[43] Because we find no basis for the imposition of terminal trackage rights here, we need not decide whether the track in question is a "terminal facility" as that term is used in 49 U.S.C. 11102(a).

DM&E/IC&E connection at Owatonna, and, once that connection has been established, trackage rights in the Sub-No. 2 docket will facilitate applicants' operations south of Owatonna.[44]

Environmental Issues. The National Environmental Policy Act, 42 U.S.C. 4321-43 (NEPA), generally requires federal agencies to consider "to the fullest extent possible" environmental consequences "in every recommendation or report on major federal actions significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C). Under both the regulations of the President's Council on Environmental Quality (CEQ) and our own environmental rules, actions whose environmental effects are ordinarily insignificant may be excluded from NEPA review across the board, without a case by case review.[45] Such activities are said to be covered by a categorical exclusion, which CEQ defines at 40 CFR 1508.4 as:

> a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no effect in procedures adopted by a federal agency in implementation of these regulations. . . . and for which, therefore, neither an environmental assessment nor an environmental impact statement is required.

Our environmental rules contain various categorical exclusions. As pertinent here, a merger proposal that would not result in operational changes that exceed certain thresholds — generally an increase in rail traffic of at least eight trains a day or a 100 percent increase in rail traffic (measured in gross ton miles annually) — normally requires no environmental review.[46] 49 CFR 1105.6(c)(2)(i), 1105.7(e). Trackage rights proposals also typically are excluded from the need to prepare environmental documentation. 49 CFR 1105.6(c)(4).

Applicants contend that the DM&E/IC&E control transaction will cause only modest changes in carrier operations, none of which will exceed the thresholds triggering environmental review established in 49 CFR 1105.6(c)(2)(i) and 49 CFR 1105.7(e)(4), (5). Applicants, citing 49 CFR 1105.8(b)(1), (3), further contend that the control transaction is exempt from historic review under the

[44] As is customary, the trackage rights will be subject to the employee protective conditions set out in Norfolk and Western, as modified in Mendocino Coast.

[45] 40 CFR 1500.4(p), 1508.4; 49 CFR 1105.6(c).

[46] An agency's procedures for categorical exclusions "shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect," thus requiring an Environmental Assessment or an Environmental Impact Statement. See 49 CFR 1105.6(d). But absent extraordinary circumstances, once a project is found to fit within a categorical exclusion, no further NEPA procedures are warranted.

National Historic Preservation Act (NHPA). None of the other parties or commenters have contended that preparation of environmental documentation for this control transaction is warranted.

We agree that no environmental or historic review is warranted in the common control and trackage rights matters before us here. See 49 CFR 1105.6(c)(2)(i), (4); 49 CFR 1105.7(e)(4), (5); and 49 CFR 1105.8(b)(1), (3).

It should be noted, however, that in IC&E/I&M Asset Acquisition we imposed a condition precluding DM&E from handling any traffic moving to or from the line we approved in PRB Construction over what are now IC&E lines until an appropriate environmental review has been conducted in the IC&E/I&M asset acquisition proceeding. As we explained in our IC&E/I&M Asset Acquisition decision served July 22, 2002 (slip op. at 16-17), that new environmental inquiry will be initiated when DM&E notifies the Board that it has begun construction of the new line, and provides the Board with additional necessary traffic and environmental information. Deferring that environmental examination is appropriate given the current uncertainty as to whether the line approved in PRB Construction will be built,[47] and, if built, what portion of the traffic from/to that new line would move over the I&M (now IC&E) lines. The information we would need to assess the potential environmental impacts is not yet available.[48] Therefore, it would be premature to attempt to conduct such an assessment now.[49]

Effective Date. Applicants indicated, in their initial submission, that they would like to consummate the DM&E/IC&E control transaction as soon as possible, and asked that we shorten the usual 30-day period between the service date of an approval decision and the effective date of that decision. See DME-3 at 8 (applicants asked that approval be effective on the 12th day after the service date of our decision); DME-3 at 14 (applicants asked that approval be effective no later than January 31, 2003). Applicants, however, have not renewed this request in their rebuttal submission. In these circumstances, we will adhere to our usual practice. This decision will therefore be effective on March 5, 2003.

[47] In PRB Construction, as in all our licensing proceedings, our construction authority is permissive. DM&E will have to acquire the right-of-way, secure financing, and obtain approvals from certain cooperating agencies before it can construct the new line. Thus, it is not yet definite that the construction project will proceed.

[48] As DM&E has not yet obtained any specific contracts to handle PRB coal, the ultimate destination of its potential PRB coal traffic is not known, and the number of PRB coal trains that would interchange at any particular point is therefore unavailable.

[49] DOT concurs with our approach.

Based on the record, we find:

1. The acquisition of control by Dakota, Minnesota & Eastern Railroad Corporation and Cedar American Rail Holdings, Inc., of Iowa, Chicago & Eastern Railroad Corporation will not substantially lessen competition, create a monopoly, or restrain trade in freight surface transportation in any region of the United States.

2. This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. In STB Finance Docket No. 34178, the proposed acquisition of control by Dakota, Minnesota & Eastern Railroad Corporation and Cedar American Rail Holdings, Inc., of Iowa, Chicago & Eastern Railroad Corporation is approved.

2. In STB Finance Docket No. 34178 (Sub-No. 1), the application for terminal trackage rights is denied.

3. Applicants and UP shall report to the Board on the status of their negotiations regarding the connection in Owatonna within 60 days of the service date of this decision.

4. In STB Finance Docket No. 34178 (Sub-No. 2), the DM&E/IC&E-IANR trackage rights referenced in the notice filed August 29, 2002, are authorized pursuant to the class exemption at 49 CFR 1180.2(d)(7).

5. Approval of the DM&E/IC&E control application in STB Finance Docket No. 34178 is subject to the conditions for the protection of railroad employees set out in New York Dock Ry. — Control — Brooklyn Eastern Dist., 360 I.C.C. 60, 84-90 (1979).

6. The DM&E/IC&E-IANR trackage rights at issue in STB Finance Docket No. 34178 (Sub-No. 2) are subject to the conditions for the protection of railroad employees set out in Norfolk and Western Ry. Co. — Trackage Rights — BN, 354 I.C.C. 605, 610-15 (1978), as modified in Mendocino Coast Ry., Inc. — Lease and Operate, 360 I.C.C. 653, 664 (1980).

7. Any conditions that were requested by any party in the STB Finance Docket No. 34178 proceeding and/or in the two embraced proceedings but that have not been specifically approved in this decision are denied.

8. This decision shall be effective on March 5, 2003.

By the Board, Chairman Nober, Vice Chairman Burkes, and Commissioner Morgan. Vice Chairman Burkes commented with a separate expression.

Vernon A. Williams
Secretary

Vice Chairman Burkes, Commenting:

I vote to approve this decision which will allow DM&E to acquire IC&E, but I am very concerned that most of the substantial benefits of this transaction could be delayed for months and even years which could cause considerable competitive, operational and economic harm to the combined DM&E/IC&E system and the shippers it will serve. I strongly urge the parties to quickly resolve the Owatonna issue.

APPENDIX A: ABBREVIATIONS AND ACRONYMS

AECC	Arkansas Electric Cooperative Corporation
BLE	Brotherhood of Locomotive Engineers
BNSF	The Burlington Northern and Santa Fe Railway Company
Board	Surface Transportation Board
BRC	The Belt Railway Company of Chicago
CBRA	Chillicothe-Brunswick Rail Authority
CC&P	Chicago, Central & Pacific Railroad Company
CEDR	Cedar River Railroad Company
CFR	Code of Federal Regulations
CLO	Cooperating Labor Organizations
CMW	Chicago, Missouri & Western Railway Company
CN	Canadian National Railway Company
CPR	Soo Line Railroad Company d/b/a Canadian Pacific Railway
CNW	Chicago & North Western Transportation Company
DM&E	Dakota, Minnesota & Eastern Railroad Corporation
DOT	U.S. Department of Transportation
DRGW	The Denver and Rio Grande Western Railroad Company
EJ&E	Elgin, Joliet & Eastern Railway Company
FR	Federal Register
FRA	Federal Railroad Administration
GWWR	Gateway Western Railway Company
Holdings	Cedar American Rail Holdings, Inc.
IAIS	Iowa Interstate Railroad Ltd.
IANR	Iowa Northern Railway Company
IATR	Iowa Traction Railroad Company
IC	Illinois Central Railroad Company
ICC	Interstate Commerce Commission
IC&E	Iowa, Chicago & Eastern Railroad Corporation
IDOT	Iowa Department of Transportation
IHB	Indiana Harbor Belt Railroad Company
IRN	Illinois RailNet, Inc.
I&M	I&M Rail Link, LLC
KCS	The Kansas City Southern Railway Company
KCT	Kansas City Terminal Railway Company
MCRC	Minnesota Commercial Railway Company
Metra	Commuter Rail Division of the Regional Transportation Authority of Northeast Illinois d/b/a Metra
MidAmerican	MidAmerican Energy Company
MP	milepost

MP	Missouri Pacific Railroad Company
MP&W	Muscatine Power and Water Company
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
NS	Norfolk Southern Railway Company
PRB	Powder River Basin
RGI	Rio Grande Industries, Inc.
RTP	Rail Transportation Policy
SF	The Atchison, Topeka and Santa Fe Railway Company
Soo	Soo Line Railroad Company
SP	Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company
STB	Surface Transportation Board
TRA	Trackage Rights Agreement
UP	Union Pacific Railroad Company
WCTL	Western Coal Traffic League
WP	Western Pacific Railroad Company
W&S	Wisconsin & Southern Railroad Company

APPENDIX B: SUBMISSIONS RESPECTING COMMON CONTROL

Arkansas Electric Cooperative Corporation. AECC, a membership-based generation and transmission cooperative that provides wholesale electric power to electric cooperatives, holds ownership interests in three coal-fired Arkansas generating stations (the White Bluff plant at Redfield, the Independence plant at Newark, and the Flint Creek plant at Gentry) that burn, each year, more than 14.5 million tons of PRB coal (AECC's share of this coal is approximately 5 million tons). AECC contends that, because the DM&E/IC&E combination, though essentially end-to-end in nature, has the potential to generate anticompetitive effects, action must be taken to preserve both: (a) the competitive options that DM&E will be able to provide if and when it constructs its recently-approved PRB line; and (b) the competitive options that an independent I&M could have provided in conjunction with an anticipated non-DM&E PRB line that would be oriented to coal receivers in the south-central United States.[50]

DM&E's Own PRB Line. AECC concedes that, even after DM&E's recently-approved PRB line has been constructed, PRB coal moving to AECC's Arkansas facilities will not move via the DM&E line (because, as respects destinations in Arkansas, the route to be operated by DM&E will be a good deal more circuitous than the routes now operated by UP and BNSF).[51] AECC asserts, however, that DM&E itself has acknowledged, in its filings in the PRB Construction case, that the construction of DM&E's PRB line will generate indirect benefits for utilities, such as AECC, that are not in the DM&E "market area." AECC explains that, in the PRB Construction case, DM&E sought and obtained support from such utilities (including AECC) on the explicit premise that its project would expand rail capacity from the PRB, and would thereby produce indirect benefits even for utilities that would not be able to make effective use of DM&E routings. Such utilities, AECC further explains, supported DM&E's PRB project because they believed that expanded capacity would be at least marginally beneficial to overall system fluidity, leading to decreased cycle times and increased reliability, which, in turn, would lead to improved efficiency in the use of shipper-owned cars and reduced fleet size and coal stockpile requirements. AECC therefore maintains that it has an interest (an interest, AECC adds, that was fostered and has been relied upon by DM&E itself) in actions DM&E may take with respect to its PRB project.

This interest is implicated here, AECC contends, because, even aside from the issues raised by DM&E/IC&E common control, certain recent developments have suggested that DM&E's PRB

[50] Letters expressing support for AECC's efforts to preserve the competitive options that an independent I&M could have provided have been submitted by three utility companies: Dominion Resources, Inc.; Entergy Corporation; and Midwest Generation EME, LLC. See AECC-1.

[51] AECC indicates that the DM&E/IC&E route from the PRB to Kansas City (via Owatonna) would be on the order of 1,350 miles, over 500 miles longer than existing UP and BNSF routes.

revenues are likely to be significantly lower than originally projected, which (AECC claims) calls into question the financial viability of DM&E's PRB project. (1) AECC contends that, whereas DM&E has previously estimated (in the PRB Construction context) that variable costs for UP's and BNSF's PRB coal movements run about 7.9-8.0 mills per ton mile, there is now reason to believe that, at least in one instance, variable costs for UP's PRB coal movements are approximately 2 mills lower. (2) AECC contends that, whereas DM&E's revenue projections (in the PRB Construction context) incorporated a rate premium based on DM&E's purported cycle time advantage vis-à-vis UP and BNSF, there is now reason to believe that UP's and BNSF's cycle times are actually equivalent to, and sometimes are better than, those projected for DM&E. (3) AECC contends that, whereas DM&E's volume projections (in the PRB Construction context) started at 40 million tons per year and increased to 100 million tons per year, there is now reason to believe that those numbers are overly optimistic.

And, AECC continues, its interests vis-à-vis DM&E's PRB project are further implicated by certain "cross-over effects" that, though not disclosed by DM&E, further call into question the viability of that project. AECC warns that, without a proper assessment of these "cross-over effects," the Board will not be able to determine whether DM&E/IC&E common control will delay or eliminate the benefits of DM&E's PRB project. (1) AECC contends that, because DM&E's original plan (in the PRB Construction context) did not include I&M in its list of feasible options for reaching Chicago, the Board cannot now determine whether the additional costs associated with DM&E's planned reliance on IC&E (such additional costs, AECC explains, are related to any capital improvements needed to enable IC&E to support heavy-haul coal trains) will jeopardize the financial feasibility of DM&E's PRB project. (2) AECC contends that, even if IC&E negotiates a settlement that will enable it to use the original I&M route to reach Chicago (or even if IC&E can make alternative arrangements with other railroads to reach Chicago), the Board cannot now determine whether the financial terms associated with IC&E's access to Chicago will support the financial and competitive performance of DM&E's PRB project as originally planned. (3) AECC contends that CPR — reacting to the IC&E/I&M asset acquisition transaction — has terminated various I&M/CPR interchange agreements, which (AECC continues) means that DM&E will not be able to use certain DM&E-I&—CPR routings to access certain markets (e.g., coal receivers in or accessed via Minneapolis/St. Paul). This is important, AECC explains, because, in the PRB Construction context, DM&E's revenue projections were premised on its use of these routings to serve these markets. There is thus, AECC continues, no assurance that DM&E will be able to serve these markets (which, AECC adds, include DM&E's core markets) in the manner it originally projected. (4) AECC contends that, to some extent, use of IC&E to reach Chicago calls into question the entire rationale for using the DM&E mainline to reach the PRB. AECC explains: that the IC&E line that extends west to Sheldon, IA, is part of a Milwaukee Road right-of-way that extends further westward to Rapid City, SD; that DM&E's projected PRB line crosses the Milwaukee Road right-of-way in the vicinity of Creston, SD (in the general vicinity of Rapid City); and that, from Creston, the Milwaukee Road route to Chicago (via Charles City) would be approximately 70 miles shorter than the DM&E route (via Owatonna). The Board, AECC argues, has not considered and does not have the information necessary to consider this potentially more efficient alternative alignment.

An Anticipated Non-DM&E PRB Line. AECC contends that, given the uncertainty regarding the viability of DM&E's PRB project, and given too that many plants in the south-central United States would not enjoy new PRB routing options even if DM&E's PRB line were built, a number of utilities have expressed support for the construction of a non-DM&E line into the PRB. These utilities apparently have in mind the restoration of the CNW "Cowboy Line" that once extended across northern Nebraska, which (the plan apparently goes) could be extended west to the PRB and south to Kansas City.[52] AECC contends that a revitalized Cowboy Line with a connection to Kansas City would offer the potential for significant mileage reductions in comparison with existing UP and BNSF routes to points in the south-central United States (points, AECC notes, that will not be served by DM&E's PRB line), and could also be used for coal movements to various destinations that will be served by DM&E's PRB line, including: certain rail-served plants in eastern Iowa, northeastern Iowa, and Wisconsin; certain rail-served plants in northern/central Illinois and northern Indiana that could be reached via an IC&E/EJ&E connection at Joliet, IL; and certain plants that can be effectively served via Mississippi River dock facilities. AECC further contends that, given the geographical distribution of actual and prospective PRB coal movements, an outlet at Kansas City would be far more valuable for many utilities than any outlet that relies on the DM&E main line (with or without the IC&E lines).

DM&E's PRB project and DM&E/IC&E common control apparently pose, from AECC's perspective, two obstacles to restoration of the Cowboy Line. (1) The first obstacle, though not mentioned explicitly by AECC, is that, because DM&E's PRB line and a revitalized Cowboy Line would be competitors for a large volume of PRB traffic, it is not likely (as a practical matter) that both projects can come to fruition, which means (again, as a practical matter) that, if DM&E's PRB line is built first, AECC's new Cowboy Line will never be built at all. (2) The second obstacle, which is mentioned explicitly by AECC, is that, because a large volume of the traffic projected to move via the new Cowboy Line will have to be interchanged at Kansas City with IC&E, the new Cowboy Line will have to have a neutral IC&E connection at Kansas City. And the availability of this neutral connection, AECC contends, has been threatened in two separate ways. First, AECC contends, the extent of a physical IC&E connection at Kansas City has been called into question by actions taken by CPR, which (AECC suggests) has taken issue with the IC&E/I&M asset acquisition transaction. Second, AECC contends, the existence of a neutral IC&E connection is threatened by DM&E's interest in protecting its ability to build its own PRB line; DM&E, AECC explains, apparently believes that it will be most likely to realize a return on the substantial investment it has already sunk into its own PRB project if it can prevent others from establishing a new PRB service.

[52] See Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company—Control and Merger—Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company [General Oversight], STB Finance Docket No. 32760 (Sub-No. 21), Dec. No. 21 (STB served Dec. 20, 2001), slip op. at 9.

Relief Requested By AECC. AECC contends that, to ensure that DM&E's private interests do not override the public interest in preserving existing rail competition and fostering the development of new competitive options where feasible, we should impose several conditions on approval of DM&E/IC&E common control. AECC adds that it does not oppose such common control, provided that suitable conditions are imposed to preserve the pre-merger competitive capabilities of I&M.

(1) AECC contends that we should require DM&E to provide, to any new rail carrier serving the PRB, access to the lines formerly operated by I&M, on cost-based (including return on investment) and nondiscriminatory terms and conditions. AECC contends, in particular, that we should require DM&E to maintain, at Kansas City, neutral connections for PRB coal with any new railroad serving the PRB which may connect at Kansas City with the lines formerly operated by I&M. AECC apparently has in mind that these neutral connections, which might require trackage rights, would have to be made available on the same highly competitive terms that I&M would have offered to attract new business.[53]

(2) AECC contends that we should require DM&E to submit a formal statement regarding the status of financing for its PRB construction project.

(3) AECC contends that we should require DM&E to identify and address remedial measures for the "cross-over effects" between the IC&E/I&M asset acquisition transaction and DM&E's PRB construction project, including the ability to reach Chicago in an efficient manner that will serve unit train coal traffic as well as merchandise traffic.

(4) AECC contends that we should require DM&E to prove that I&M's connectivity at Kansas City is being preserved, and that the terms of IC&E's access to Kansas City, Chicago, and other relevant points have not been compromised in a manner that would hinder competitiveness for volume coal movements.

WCTL's Response To AECC; Relief Suggested By WCTL. WCTL advises that AECC's request that any newly established PRB carrier be provided nondiscriminatory access to IC&E, and its related request that DM&E/IC&E maintain neutral connections at Kansas City for interchanging PRB coal traffic with any such new PRB carrier, are constructive, though perhaps premature. WCTL explains that AECC's concerns may already have been addressed through representations made by

[53] AECC argues that DM&E's hostile attitude toward offering the I&M lines for neutral connections — even for traffic that would not be competitive with DM&E traffic — conflicts with the policy that consolidating carriers should maintain open gateways and neutral connections. See Major Rail Consolidation Procedures, slip op. at 25 (we indicated that "we agree[d]" with the "[n]umerous parties" that had "stress[ed] that gateways must be kept open not just physically but economically."). AECC adds that, although that policy was announced in the context of consolidations of Class I railroads, competitive considerations also apply in the context of consolidations of Class II railroads.

applicants themselves; applicants, WCTL contends, have represented that DM&E/IC&E common control will not cause any customer to lose any competitive rail service options, will not involve the elimination of facilities or the discontinuation of service, and will not threaten the economic viability or competitive effectiveness of other railroads. WCTL further explains that, at least to the extent that any potential future new PRB carrier would seek to serve electric utilities outside the area of DM&E's proposed service territory, DM&E should have every economic incentive to negotiate mutually agreeable terms and conditions for service over its facilities.

WCTL notes, however, that it is cognizant of AECC's concerns about the need to protect against the possibility that DM&E may be unwilling to negotiate, in good faith, appropriate connection/access agreements with any possible new-entrant PRB carrier. WCTL believes that, to protect against such an eventuality, it would be appropriate for the Board to consider requiring DM&E to negotiate, in good faith, reasonable IC&E connection and access terms at Kansas City with any new PRB carrier, while reserving, as part of the Board's continuing oversight of the transaction, the right to impose appropriate competitive enhancement measures should such negotiations fail.[54] This, WCTL advises, would help ensure that approval of DM&E/IC&E common control will not reduce important future PRB competitive service options by new market entrants, while fully preserving the economic benefits of DM&E's PRB construction project and protecting DM&E from possible economic harm. And, WCTL adds, such measures would be consistent with those approved in the CN/WC proceeding[55] and with the requirement in the Board's new merger rules that merger applicants include competitive enhancements as part of their merger plans.[56]

WCTL further contends, however, that we should reject the other conditions sought by AECC. WCTL explains that the various arguments — respecting matters such as project viability, project costs, and financing plans — that were made by parties to our PRB Construction proceeding were fully considered in that proceeding and do not warrant reconsideration in this proceeding. And, WCTL adds, it is particularly troubled by AECC's suggestion that we should re-assess DM&E's financing plans for its PRB project; any action by the Board to reopen this matter now, WCTL warns, would lead to additional, and possibly fatal, delay in bringing this privately financed project to fruition.

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[54] The "competitive enhancement measures" contemplated by WCTL would apparently be such as to preserve competition at potential future connection points between IC&E and a possible new PRB rail carrier entrant.

[55] See CN/WC, slip op. at 12-14 (holding the CN/WC applicants to their representations respecting gateways).

[56] See Major Rail Consolidation Procedures, slip op. at 10 ("major merger" applicants are now required to present proposals that enhance, not merely preserve, competition).

Applicants' Response To AECC. Applicants contend that AECC's proposed conditions should be denied. AECC, applicants argue, has not provided any justification for its proposed conditions; it has failed to identify the routes it is seeking to protect; it has not even specified precisely where its proposed line would connect with IC&E; it has not provided any evidentiary support for its allegation (its false allegation, applicants insist) that DM&E has shown a "hostile attitude" toward joint-line routings with other carriers; and it has not provided any evidentiary support for its claim (its false claim, applicants add) that DM&E/IC&E common control would somehow harm DM&E's plans to construct a DM&E line into the PRB. Applicants further advise: that none of the power plants operated by AECC and its supporters are located on either DM&E or IC&E; that, furthermore, approval of DM&E/IC&E common control would not in any way prevent AECC from proceeding with whatever plans it has to construct whatever PRB lines it has in mind; and that, in any event, to the extent AECC has issues with DM&E's proposed PRB project, those issues should not be litigated (relitigated, in essence) in the present proceeding.

Muscatine Power And Water Company. MP&W, a municipal electric utility headquartered in Muscatine, IA, owns and operates four coal-fired electric generating facilities, three of which are located at the Muscatine Electric Generating Station (Muscatine Station) in Muscatine. The Muscatine Station, which is rail-served by a single railroad (IC&E), burns, on an annual basis, approximately 1.1 million tons of coal, all of which is currently acquired from the Buckskin Mine in the PRB of Wyoming. MP&W advises: that this coal moves by rail on BNSF to Ottumwa, IA, where it is interchanged with IC&E (formerly I&M) for delivery to the Muscatine Station; that this BNSF/IC&E movement is provided in accordance with two separate proportional rate contracts, one with BNSF and one with IC&E; and that, when IC&E acquired the assets of I&M, IC&E accepted the proportional rate contract that MP&W had in place with I&M for delivery of PRB coal to the Muscatine Station. MP&W further advises that the transition from I&M to IC&E occurred smoothly, without disruptions in service. MP&W indicates that, although it initially had concerns relating to interchange gateways, it has since reached an agreement with applicants that addresses those concerns. And MP&W adds that, based on this agreement, it is now in full support of the DM&E/IC&E control transaction.

Western Coal Traffic League. WCTL, an organization whose members are major purchasers of PRB coal,[57] contends that DM&E/IC&E common control is in the public interest and that, for this reason, the DM&E/IC&E control application should be approved.

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[57] WCTL's members include: Alliant Energy; Arizona Electric Power Cooperative, Inc.; Associated Electric Cooperative, Inc.; Center Point Energy; Central Louisiana Electric Company, Inc.; City of Austin, TX; City Public Service Board of San Antonio; Kansas City Power & Light Company; Lower Colorado River Authority; MidAmerican Energy Company; Minnesota Power; Nebraska Public Power District; NRG Power Marketing Inc.; Omaha Public Power District; Texas Municipal Power Agency; Western Resources, Inc.; Wisconsin Public Service Corporation; and Excel Energy.

DM&E's PRB Construction Project. WCTL contends that, as it argued in its pleadings filed in the PRB Construction case, DM&E's PRB construction project is an important private sector investment initiative that will provide competitive and service benefits for coal shippers. WCTL further contends that there is sufficient public demand for the project, that DM&E's business projections are achievable, and that the project, once completed, will improve DM&E's existing services and provide needed additional rail infrastructure capacity in the West and Midwest. WCTL indicates that it continues to support DM&E's PRB project because (in WCTL's view) that project will result in enhanced PRB rate competition, demonstrable service improvements and efficiencies, and an increase in the capacity of the national rail system, all while increasing incentives for the existing PRB incumbents (UP and BNSF) to be better and more responsive rail service providers and marketplace competitors. And, WCTL adds, we should resist any invitation to relitigate issues that were fully resolved in the PRB Construction case, because (WCTL advises) relitigation of such issues would only serve to divert attention away from the relevant issues and hamper our ability to efficiently process the instant proceeding on the merits.

DM&E/IC&E Common Control. WCTL contends that the IC&E lines (which, WCTL notes, run between Chicago, Kansas City, and the Twin Cities, and across northern Iowa and southern Minnesota) are an important connection and access link on the eastern part of the DM&E system, that will allow DM&E to reach its current and future customer base. WCTL further contends that approval of DM&E/IC&E common control will help preserve rail service to existing and future customers on both the DM&E lines and the IC&E lines. And, WCTL adds, DM&E/IC&E common control should improve DM&E's existing services, and provide needed additional rail infrastructure capacity in the West.

MidAmerican Energy Company. MidAmerican, which is IC&E's largest shipper by volume, ships about 13 million tons a year of PRB coal to its generating stations in Iowa. MidAmerican advises that IC&E delivers PRB coal, from interchanges with other railroads, to MidAmerican's Louisa station near Fruitland, IA, and its Riverside station in Bettendorf, IA. MidAmerican further advises that the availability of secure, efficient, and competitive rail service is extremely important to MidAmerican's competitiveness within its own utility market.

MidAmerican reports that, in the past, railroad acquisition and integration problems have created serious service disruptions. MidAmerican indicates, however, that, to date, IC&E has done a remarkable job in executing a smooth transition. MidAmerican advises that, because the transition has thus far gone well and because MidAmerican anticipates continued service improvements with full integration of DM&E and IC&E, it supports DM&E/IC&E common control. MidAmerican contends that common control will be in the public interest, will enhance the stability of both carriers, and will present opportunities to improve rail service for shippers on IC&E, including MidAmerican. And, MidAmerican adds, a regional partnership between DM&E and IC&E, and the various synergies the two carriers should be able to achieve, will help ensure the long-term viability of critical components of the Iowa rail transportation infrastructure, and, in conjunction with DM&E's proposed line construction

into the PRB, will create a new single-system transportation option that could meet MidAmerican's coal sourcing needs.

Soo Line d/b/a Canadian Pacific Railway. CPR, a Class I railroad, is a former owner of the railroad properties now owned by IC&E. CPR advises that, prior to the IC&E/I&M asset acquisition transaction, CPR had close operational and financial ties with, and a minority ownership interest in, I&M. CPR further advises that, because of geographic closeness and long-term contracts assumed by IC&E upon its purchase of the assets of I&M, the close CPR/I&M relationship has by necessity carried through to IC&E, and that, although the direct financial ties that existed between CPR and I&M no longer exist, a number of contractual relationships still do exist (CPR indicates, by way of example, that it has contractual duties to one IC&E customer that will require CPR to provide service to that customer if IC&E fails to provide service at specified levels; CPR also indicates that, in view of a contractual agreement that may require CPR to guarantee certain IC&E payments to Metra if IC&E falters financially, CPR has an interest in assuring that IC&E has the financial stability and operational acumen to run trains into the Chicago area over IC&E's main route into the city, Metra's "West Line" from Pingree Grove to Cragin Junction). And, CPR adds, its interest in DM&E/IC&E common control also reflects the fact that IC&E has trackage rights on CPR's River Junction-Twin Cities line, and interchanges traffic with CPR at several locations.

Minnesota City Gateway. CPR contends that, even though DM&E has not explicitly indicated an intention to close the DM&E/CPR gateway at Minnesota City, action should be taken to keep that gateway open, as respects DM&E traffic moving north and east over CPR (north via CPR's Minnesota City-Twin Cities line and east via CPR's River Junction-Chicago line) and also as respects CPR traffic moving west over DM&E. The shipping public, CPR argues, will benefit if the Minnesota City gateway is kept open for "interline division interchange traffic."

(1) As respects PRB coal moving to plants in the Twin Cities and central and northern Wisconsin, CPR fears that DM&E will divert this traffic from its most natural routing (the DM&E/CPR routing via Minnesota City and the Twin Cities) and force it onto a more circuitous routing (the DM&E/IC&E routing via Owatonna and Chicago). CPR warns, however, that a DM&E effort to close the Minnesota City gateway and move coal traffic via IC&E into Chicago would defeat the mileage advantage for Upper Midwest power producers that provided partial justification for DM&E's PRB construction project. For this reason alone, CPR argues, a condition requiring that the Minnesota City gateway remain open would be appropriate.

(2) As respects grain traffic originated by DM&E in South Dakota and southern Minnesota and moving to Chicago, CPR fears that DM&E will divert this traffic from a DM&E/CPR routing (via Minnesota City) to a DM&E/IC&E routing (via Owatonna). CPR, though it concedes that shippers may potentially be benefitted by the increase in routing alternatives, insists that shippers should nevertheless have the right to choose the DM&E/CPR route via Minnesota City, which (CPR claims) is in better physical shape, is more direct, is faster, and (all things considered) is more cost-effective than

the DM&E/IC&E route via Owatonna. And, CPR adds, a shipper's right to choose the DM&E/CPR route can only be preserved if the Minnesota City gateway remains a viable option.

(3) CPR further contends that the public interest would also be served by keeping the Minnesota City gateway open for fertilizer shipments coming south from Canada on CPR that are interchanged with DM&E at Minnesota City for movement to farmers in southwestern Minnesota and South Dakota.

Metra's West Line. CPR advises (in its comments filed November 14, 2002) that, as applicants had previously noted (in their primary application, filed August 29, 2002), IC&E's ability to move traffic into the Chicago terminal remains the subject of ongoing negotiations. CPR explains: that CPR has trackage rights over Metra's West Line pursuant to a 1985 Trackage Rights Agreement (the 1985 TRA) between CPR's and Metra's predecessors in interest; that I&M, which moved traffic from/to Chicago via the West Line, was admitted to the West Line as a "third party admittee" under the terms of the 1985 TRA; that, however, disputes have arisen as to the assignability to IC&E of the contract (hereinafter referred to as the I&M agreement) that allowed I&M this access to Chicago, and litigation has ensued; that the litigation has been stayed pending negotiations between the parties over a new agreement that would give IC&E more permanent rights to operate over the West Line; and that, although IC&E traffic has already begun moving over the West Line, it has been moving pursuant to a temporary detour arrangement between IC&E and Metra.

CPR further advises that certain issues respecting the specific provisions of the I&M agreement that might carry through to any new IC&E agreement have not yet been resolved. CPR indicates that IC&E has taken the position that the I&M agreement is assignable in whole, that CPR has no right to object to an assignment to IC&E, and that Metra's consent to such an assignment is not required. CPR further indicates that Metra and CPR have taken the position that no attempt at assignment can be effective without Metra's consent, which (CPR notes) has not yet been given.

CPR cautions that, if negotiations fail, the applicability of the various terms of the I&M agreement may be determined in court. CPR adds that, whether the court chooses to impose the terms of the I&M agreement on CPR, IC&E, and Metra, or whether the court finds that no assignment has taken place, there will be implications for shippers, the freight railroads, and Metra.

Relief Requested By CPR. (1) As respects the Minnesota City gateway, CPR asks that a condition be imposed that would require the combined DM&E/IC&E to keep this gateway open for "interline division interchange traffic" to allow competitive routing for grain, coal, and other shippers who currently use that gateway. This condition, CPR adds, would give shippers more choice with

respect to their grain movements, and would also allow the realization of "short haul" advantages for potential DM&E PRB coal movements to Minnesota and Wisconsin plants.[58]

(2) As respects Metra's West Line, CPR has not asked that a specific condition be imposed, but it has asked that we recognize: that there remain open questions regarding IC&E's access to Chicago over this line; and that these questions may require action on our part in the future.

Applicants' Response To CPR. (1) Applicants contend that CPR's "Minnesota City gateway" condition should be rejected because: CPR has presented no evidence that DM&E has any plan or intent to cancel its interchange with CPR or otherwise "close" the Minnesota City gateway following common control;[59] CPR has made no showing that Board intervention is necessary to protect against loss of efficient routing opportunities for shippers;[60] and, in any event, the ICC and the Board have long held that gateway protection conditions are anticompetitive and not in the public interest.[61]

(2) Applicants contend that, although IC&E's access to Chicago via Metra's West Line remains the subject of negotiations among IC&E, Metra, and CPR, there is no basis for concern. Negotiations to settle litigation over the assignment to IC&E of the trackage rights held by I&M over Metra's line, applicants advise, have been ongoing, and substantial progress has been made toward an

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[58] Although one version of the condition sought by CPR would keep the Minnesota City gateway open to allow competitive routing options for shippers "who currently use that gateway," CPR's comments at 3, it is clear that CPR has in mind that the open gateway condition would also apply to PRB coal shipments that do not "currently" use the DM&E/CPR Minnesota City gateway. See also CPR's comments at 5 (the simplest version of the condition sought by CPR would merely require the combined DM&E/IC&E "to keep this gateway open.").

[59] Applicants note that, despite what CPR has suggested, Minnesota City is not today an "open" gateway. Applicants explain that, although IC&E also operates through Minnesota City on overhead trackage rights over CPR's line and physically could interchange traffic with DM&E, the trackage rights agreement between CPR and IC&E prohibits IC&E from interchanging any traffic with DM&E at Minnesota City.

[60] Applicants note that no shipper filed comments expressing concern over future routing opportunities via Minnesota City. And, applicants add, CPR presented no evidence of any shipper support for its proposed condition.

[61] See CSX Corp. et al. — Control — Conrail Inc. et al., 3 S.T.B. 196, 303 (1998) ("We continue to believe that conditions of this type [a "routing condition" that would have preserved a railroad's existing routings with one of the merger applicants] are inefficient, anticompetitive, and contrary to the public interest.").

agreement that would replace I&M's rights with new long-term IC&E trackage rights over the line. See DME-9 at 5.

Metra. As previously noted, Metra initially disputed applicants' claim that IC&E acquired, as assignee from I&M, I&M's rights to use Metra's West Line. (1) In its notice of intent to participate (filed October 15, 2002), Metra advised that it had granted IC&E temporary access to the West Line pursuant to a detour agreement, and that it had entered into negotiations with IC&E and CPR over the terms on which IC&E would be granted permanent access to the West Line. (2) In its comments (filed November 13, 2002), Metra advised that it believes that the negotiations, although not yet completed, are likely to result in a satisfactory resolution of its concerns. Metra further advised that it also believes that it possesses, independent of the DM&E/IC&E common control proceeding, remedies that will suffice to protect its interests in the event that the negotiations do not result in a satisfactory resolution of its concerns.

Brotherhood Of Locomotive Engineers. BLE is a railway labor organization that represented the craft of locomotive engineers on I&M. BLE notes that, in connection with the IC&E/I&M asset acquisition transaction that was docketed in STB Finance Docket No. 34177, BLE joined with the other rail labor organizations representing I&M employees to form the Cooperating Labor Organizations (CLO), which filed a petition to revoke the class exemption that had been used by IC&E in the STB Finance Docket No. 34177 proceeding.

BLE, which urges the dismissal of the DM&E/IC&E control application, contends here, as CLO contended in the STB Finance Docket No. 34177 proceeding, that the IC&E/I&M asset acquisition transaction must be consummated under 49 U.S.C. 11323(a)(3) and cannot be consummated under 49 U.S.C. 10901. BLE contends, in essence, that the two transactions asserted by applicants (the IC&E/I&M asset acquisition transaction docketed in STB Finance Docket No. 34177, and the DM&E/IC&E control transaction docketed in STB Finance Docket No. 34178) are, in reality, a single DM&E/I&M transaction (i.e., the acquisition of control of I&M by DM&E). BLE further contends that DM&E has utilized the "sham" two-step procedure to circumvent the collective bargaining agreements entered into by the CLO unions and I&M and to evade the protections to which the employees are entitled.

Applicants' Response To BLE. Applicants indicate that they do not anticipate that any existing DM&E or IC&E employees will be adversely affected by DM&E/IC&E common control; the arguments raised by CLO in the STB Finance Docket No. 34177 proceeding and repeated by BLE in the instant proceeding are, applicants claim, wholly without merit. And, applicants add, BLE has neither pointed to any harm to employees from DM&E/IC&E common control nor shown why New York Dock labor protection would not adequately protect any adversely affected employees.

Iowa Department Of Transportation. IDOT supports the DM&E/IC&E control application. (1) IDOT contends that DM&E/IC&E common control will provide another outlet for Iowa grain to

the Pacific Northwest market, an outlet that will feature a more direct and efficient connection than previously available to Iowa shippers on the IC&E lines. And, IDOT adds, while common control will provide a greater opportunity for South Dakota and Minnesota shippers by providing more outlets for their grain, overall this will provide a greater revenue base for the entire system and hence will provide the basis for preserving rail service for all shippers. (2) IDOT contends that common control will make possible certain management, operational, and financial efficiencies that may provide a window of opportunity for improving and preserving service on the IC&E lines. Indeed, IDOT advises, common control of DM&E and IC&E is the best hope for continued rail service on the lines now operated by IC&E.

United States Department Of Transportation. (1) *DM&E/IC&E Common Control, In General.* DOT contends that the DM&E/IC&E control application satisfies the § 11324(d) standard and should, therefore, be approved. DM&E/IC&E common control, DOT argues, poses no demonstrable competitive threat and may increase the financial stability of the DM&E/IC&E applicants, to the benefit of the shippers they serve. The DM&E/IC&E applicants, DOT adds, have consistently asserted that their "end-to-end" merger will produce a stronger rail system that will be better able to offer improved services to their existing shippers; and no party, DOT advises, has introduced persuasive evidence to the contrary.

(2) *Environmental Issues.* DOT agrees that, as we indicated in our IC&E/I&M Asset Acquisition decision served July 22, 2002 (slip op. at 16-17), consideration of the potential environmental impacts associated with the prospect of routing, via IC&E lines, traffic moving from/to DM&E's PRB line should be deferred until such time as DM&E is actually prepared to build that line. DOT also agrees that, until we have conducted an appropriate environmental review of the cumulative impacts of the PRB Construction approval, the IC&E/I&M Asset Acquisition approval, and DM&E/IC&E common control, IC&E should not be allowed to handle, over the former I&M lines, any trains moving from/to DM&E's PRB line. (a) DOT agrees that we must consider, at some point, the potential environmental impacts associated with the movement, via IC&E lines, of coal traffic originated on DM&E's PRB line. DOT explains that, once DM&E and IC&E come under common control, the reason given for not considering such impacts in the PRB Construction case (our lack of authority to require DM&E to take action on property it does not own) will no longer be valid (because, with common control, DM&E will effectively "own" the IC&E lines). Once DM&E and IC&E come under common control, DOT argues, heretofore "down-line" communities (on the IC&E lines) that were previously deemed ineligible for mitigation measures will be "on-line" and should be considered for relief from demonstrable harms. (b) DOT also agrees that, for the present, we should defer consideration of such "down-line" impacts, and should bar IC&E from handling, over the former I&M lines, any trains moving from/to DM&E's PRB line. DOT argues that the present uncertainty of construction and the multitude of steps that will have to take place before coal may be transported even on DM&E's own lines make it premature to impose specific obligations. Preservation of the status quo, DOT adds, both avoids potentially unnecessary or unfounded regulatory determinations and

demonstrates the proper willingness to consider mitigation measures when and where that appears appropriate.

(3) *Safety*. Transactions involving railroads of the size of DM&E and IC&E, DOT advises, do not generally present significant safety questions, and, DOT adds, it is unaware of any reason to believe that the DM&E/IC&E control transaction would be an exception to this general rule. DOT notes that, in any event, the Federal Railroad Administration (FRA) will continue to exercise its broad authority over safety in the rail industry to monitor applicants' operations.

(4) *DOT's Response To AECC.* DOT contends that, even if DM&E/IC&E common control were to have an adverse impact on the prospects for DM&E's construction of a new line into the PRB, that would not be an issue that the Board would need to consider as a regulatory matter. DOT explains that our approval of the construction of that line in our PRB Construction case was permissive (i.e., we allowed DM&E to build the line) and not mandatory (i.e., we did not require DM&E to build the line). DOT further explains that, because our approval of construction of DM&E's PRB line was merely permissive, it is not particularly pertinent whether DM&E/IC&E common control makes construction of that line more or less likely; that, DOT goes on, is a question for potential investors and financial supporters.

(5) *DOT's Response To CPR And Metra (Regarding Metra's West Line).* (a) As respects IC&E's right to access the West Line, DOT contends that CPR has made only vague references to the "implications" respecting this matter. DOT further contends that, as respects the West Line, Metra may indeed be able to protect its own interests, although (DOT adds) there are circumstances in which settlements among parties do not automatically resolve all related public interest concerns. DOT concludes by advising that, at the present time, there is no clear indication on the record of any IC&E West Line access issue that warrants the Board's attention; there is, DOT explains, simply no record to support Board action of any sort at this time. And, DOT adds, it is not proposing an oversight condition respecting the West Line. (b) As respects DM&E coal traffic that might move via the West Line, DOT agrees that, as we indicated in our IC&E/I&M Asset Acquisition decision served July 22, 2002 (slip op. at 16-17), consideration of the potential environmental impacts associated with the prospect of routing, via any IC&E line, traffic moving from/to DM&E's PRB line should be deferred until such time as there is a more realistic prospect of such traffic.

APPENDIX C: SUBMISSIONS RESPECTING TERMINAL TRACKAGE RIGHTS

Union Pacific Railroad Company. UP opposes DM&E's application for terminal trackage rights over UP's Owatonna trackage. UP contends: (1) that a grant of terminal trackage rights would be contrary to the public interest; and (2) that, in any event, DM&E is not entitled to terminal trackage rights under 49 U.S.C. 11102 and our competitive access standards.

(1) A grant of terminal trackage rights at Owatonna would be contrary to the public interest, UP argues: first, because nullification of the so-called "paper barrier" that now bars a DM&E/IC&E connection at Owatonna would unjustifiably expand by regulatory decree the rights that DM&E acquired by purchase in 1986; and second, because DM&E does not actually need terminal trackage rights in order to establish a DM&E/IC&E connection at Owatonna.

First: UP contends that the "paper barrier" exists today because, in 1986, DM&E elected to purchase only overhead trackage rights at Owatonna. And, UP insists, the 1986 DM&E/CNW agreement to grant DM&E only overhead rights in Owatonna was, taken in context, not anticompetitive but pro-competitive. UP explains: that CNW agreed to sell various lines to DM&E for reduced up-front compensation (the purchase price, UP claims, was close to liquidation value) because CNW expected DM&E to feed its on-line traffic to the CNW (now UP) system; that a key element of this feeder-line structure was CNW's retention of various segments of trackage over which DM&E received overhead trackage rights; that the structure of the DM&E spinoff was as much DM&E's choice as CNW's (i.e., CNW was willing to negotiate a sale of the Owatonna trackage at a higher price, but DM&E chose to acquire overhead trackage rights at a lower price); and that, therefore, DM&E's acquisition of only overhead trackage rights at Owatonna was not anticompetitive at all but was, rather, an integral part of a transaction that was pro-competitive because, by spinning off the DM&E lines from CNW, it preserved rail service over several hundred miles of light-density lines in southern Minnesota and South Dakota. It would not be appropriate, UP argues, for DM&E to receive, by regulatory decree, rights that it chose not to purchase at the time of its formation.

Second: UP contends that, even without the terminal trackage rights DM&E now seeks, DM&E will be able to establish a DM&E/IC&E connection at Owatonna, either by building the 1.7-mile "Alternative O-4" connection that we authorized in our PRB Construction decision[62] or by pursuing a negotiated agreement with UP to obtain from UP (via negotiations, not via regulatory decree) the right to establish an "Alternative O-5" connection at MP 87.9. UP argues that, one way or

[62] UP notes that, although DM&E sought approval for the Alternative O-4 connection in the PRB Construction proceeding, DM&E advised the Board in 1999 that it intends to build that connection "regardless" of its PRB construction project "because of the stand-alone rail service improvement and related competitive opportunities." UP-4, Groner v.s., Exhibit 4, Attachment B.2, Page 1, Item 2.

the other (i.e., either by building the Alternative O-4 connection or by negotiating the Alternative O-5 connection), DM&E will connect with IC&E without Board involvement, and (UP adds) it would disserve the public interest for the Board to short-circuit efforts to reach a marketplace solution. UP argues that, absent Board action giving DM&E an Alternative O-5 connection for free,[63] it is in the interest of both parties to reach a negotiated agreement for an Alternative O-5 connection,[64] and therefore (UP contends) the Board should not, by granting DM&E's terminal trackage rights request, eliminate DM&E's incentive to negotiate. Achieving a DM&E/IC&E connection, UP maintains, is not at stake; what is at stake, UP asserts, is the public's interest in having commercial issues resolved though private negotiations rather than Board-imposed outcomes.

(2) UP contends that, under 49 U.S.C. 11102, we may grant the terminal trackage rights sought by DM&E only if the evidence of record establishes that the Owatonna trackage is a terminal facility and that the competitive access standards announced in Midtec Paper Corporation v. CNW et al., 3 I.C.C.2d 171 (1986) (Midtec), have been met. DM&E, UP argues, is not entitled to terminal trackage rights under 49 U.S.C. 11102 and our Midtec standards: first, because the Owatonna trackage is not a terminal facility; and second, because DM&E's terminal trackage rights application does not meet our Midtec standards.

[63] UP claims that, in discussions with UP, DM&E has taken the position that, if DM&E receives the terminal trackage rights it seeks, UP would not be entitled to any additional compensation beyond that already paid for DM&E's use of UP's trackage.

[64] UP explains that a negotiated agreement is in UP's interest because, whereas UP will receive nothing if DM&E builds the Alternative O-4 connection, UP will receive at least some consideration if there is a UP-DM&E agreement on an Alternative O-5 connection. And, UP adds, a negotiated agreement is also in DM&E's interest because, whereas DM&E will have to pay the full cost of constructing an Alternative O-4 connection, DM&E will surely pay less if there is a UP-DM&E agreement on an Alternative O-5 connection. Logic, UP argues, compels the conclusion that UP and DM&E will agree on consideration (for an Alternative O-5 connection) at some value greater than zero but less than the cost of construction of an Alternative O-4 connection.

First: UP argues that, under the standards established by existing precedents,[65] the Owatonna trackage over which DM&E seeks terminal trackage rights does not include recognized terminal facilities or a terminal area and is not part of a "cohesive commercial area" that includes a terminal area, and, therefore, it cannot be a "terminal facility" under 49 U.S.C. 11102. Owatonna, UP argues, is simply a medium-sized town through which three rail lines happen to pass, and the facilities and rail operations on each of the railroads serving Owatonna are indistinguishable from those at many isolated rural points at which shipper facilities are served by local trains. The Owatonna trackage over which DM&E seeks terminal trackage rights, UP explains, is main line track that passes through Owatonna and crosses an IC&E branch line at grade; it contains no terminal facilities (no freight yards, no classification yards, no team tracks, and no engine facilities, and no car facilities either); and no active shippers are located on it. Owatonna, UP further explains, does not look like a "cohesive commercial area" even taking into consideration both the surrounding area and the shippers served by the three railroads that operate through Owatonna (Owatonna, UP notes, has only three active shippers by rail, one served by DM&E, one served by IC&E, and one served by UP; DM&E's next closest shipper to the west is 8 miles away and its next closest shipper to the east is 11 miles away; IC&E's next closest shipper to the north is 15 miles away and its next closest shipper to the south is 18 miles away; UP's next closest shipper to the north is 15 miles away and its next closest shipper to the south is 10 miles away; and none of the shippers in or near Owatonna is open to reciprocal switching or other form of

[65] "The Interstate Commerce Act does not define 'terminal facility' or what is 'a reasonable distance outside of a terminal.' While we interpret these phrases liberally, we have in the past stated that terminal functions are the transfer, collection or delivery of freight, and held that a terminal facility is 'any property of a carrier which assists in the performance of the functions of a terminal.' However, while use . . . is an appropriate starting point in defining terminal facilities, it is not the only factor bearing on the question of what constitutes terminal track. Circumstances the Commission have held significant include whether operations take place within railroad yard limits and whether service is performed within a cohesive commercial area. The presence of team tracks, freight houses or assembly facilities has also been given significant weight. Thus, the nature of the facilities and the character of the area in which they are located are as important as the use of the facility. A 'terminal area' (as opposed to main line track) must contain and cannot extend significantly beyond recognized terminal facilities, such as freight or classification yards or team tracks, and a cohesive commercial area immediately served by those facilities." Rio Grande Industries, Inc., et al. — Purchase and Related Trackage Rights — Soo Line Railroad Company Line Between Kansas City, MO and Chicago, IL, Finance Docket No. 31505, Dec. No. 6 (ICC served Nov. 15, 1989), slip op. at 10-11 (citations, footnote, and paragraph break omitted) (RGI/Soo). See also Golden Cat Division of Ralston Purina Company v. St. Louis Southwestern Railway Company, Docket No. 41550 (STB served Apr. 25, 1996), slip op. at 7 (Golden Cat) (similar statement).

access by any other railroad).[66] And, UP adds, even if Owatonna were a "cohesive commercial area," none of the railroads that operate through Owatonna have any freight yards, classification yards, team tracks, engine facilities, or car facilities in Owatonna itself or anywhere nearby.[67]

Second: UP contends that DM&E's terminal trackage rights application does not meet our Midtec "competitive access" public interest standard. (a) UP argues that DM&E's terminal trackage rights application should not be evaluated under the "bridge the gap" public interest standard used in the rail-merger context in Union Pacific — Control — Missouri Pacific; Western Pacific, 366 I.C.C. 462, 572-78 (1982) (UP/MP/WP), in Union Pacific/Southern Pacific Merger, 1 S.T.B. 233, 446-50 (1996) (UP/SP), and in CN/IC (slip op. at 51-53). UP explains that, in the rail-merger context, in order "to prevent carriers opposing a merger from blocking our ability to craft merger conditions that are clearly in the public interest," UP/SP, 1 S.T.B. at 449, non-applicant carriers have been required "to grant terminal trackage rights to another carrier only in limited circumstances where the rights were designed to bridge a gap within broader trackage rights imposed on applicants and deemed necessary to remedy or mitigate anticompetitive effects in the transaction." CN/IC, slip op. at 51-52 (citation omitted). UP further explains, however, that, in the DM&E/IC&E context, the "bridge the gap" terminal trackage rights DM&E seeks would bridge a gap in its own system for its own use; UP (UP adds) is not blocking our ability to craft merger conditions that would allow an otherwise beneficial merger to proceed. (b) UP argues that, under Midtec's "competitive access" standard, DM&E must show that UP has engaged in anticompetitive conduct with respect to the Owatonna trackage. UP claims that, because it has not engaged in anticompetitive conduct with respect to the Owatonna trackage, DM&E cannot satisfy the Midtec standard. UP adds that, although DM&E is arguing that the overhead nature of DM&E's Owatonna trackage rights represents anticompetitive conduct by UP with respect to the Owatonna trackage, the fact of the matter is that this limitation on DM&E's rights to interchange at Owatonna was integral to the creation of DM&E, which was (UP contends) a decidedly pro-competitive arrangement. (c) UP argues that, even if a broad "public interest" standard were applicable to DM&E's terminal trackage rights application, DM&E would not be entitled to terminal

[66] DM&E, UP concedes, may provide "industry switching" for its one active Owatonna shipper, but, UP argues, industry switching performed for an isolated shipper along a railroad's main line is not the type of activity that provides a basis for granting terminal trackage rights. UP-4 at 21.

[67] UP also notes that the Owatonna trackage over which DM&E seeks terminal trackage rights is not used for interchange operations, and that no traffic has been interchanged between DM&E or IC&E and any other railroad at or within 25 miles of Owatonna since at least January 1, 2000. And, UP points out, DM&E has indicated that, even if it receives the terminal trackage rights it seeks, the actual DM&E/IC&E interchange will not be conducted at Owatonna but at Mason City (72 miles to the south) because, as DM&E itself has acknowledged, "existing track configurations [at Owatonna] would not easily accommodate interchange operations." DME-2 at 45 n.7.

trackage rights at Owatonna. The rights sought by DM&E, UP explains, are not necessary for DM&E to obtain an Owatonna interchange with IC&E or any of the other benefits arising from DM&E/IC&E common control, because (UP goes on) DM&E has an approved, practical construction alternative. Nor, UP adds, are the sought rights required to avoid the wasteful construction of a new connection; provided the Board does not intervene, UP explains, UP and DM&E will negotiate a compromise respecting the Alternative O-5 connection, since both UP and DM&E stand to lose if construction proceeds. The only "benefit" arising from a grant of terminal trackage rights, UP contends, is that the price DM&E pays for the right to connect with IC&E will be established by a regulatory process rather than by negotiations. But this, UP adds, is not a public benefit; the public interest lies in the resolution of business issues such as this through private negotiations.

Applicants' Response To UP. Applicants contend that the positions taken by UP in this proceeding are contrary to the facts, contrary to precedent, and contrary to the position UP took in the UP/SP proceeding. Applicants argue: that the UP trackage which DM&E seeks to use is a "terminal facility" within the contemplation of § 11102(a); that the terminal trackage rights sought by DM&E are in the public interest; and that private negotiations are not likely to result in the acquisition of the sought terminal trackage rights.

(1) Applicants contend that the UP trackage which DM&E seeks to use is a "terminal facility" within the contemplation of § 11102(a). Applicants explain: that the phrase "terminal facilities" in § 11102(a) should be given a broad interpretation in view of that provision's remedial purpose;[68] that railroad property constitutes a terminal facility if it is located in a cohesive commercial area and is used for the transfer of freight as well as for line-haul movements through the terminal;[69] and that, because the relevant Owatonna track segment is located in the heart of the 5th largest city in southern Minnesota, and has been used for both switching and interchange movements as well as linehaul movements through the terminal, this track segment is a "terminal facility" within the meaning of § 11102(a).

[68] See Rio Grande Industries, et al. — Pur. & Track. — CMW Ry. Co., 5 I.C.C.2d 952, 979 (1989) (RGI/CMW) ("The term 'terminal facilities' should be interpreted broadly because the purpose of the section is highly remedial."); SPT v. ICC, 736 F.2d 708, 723 (D.C. Cir. 1984) ("The Commission has long held that the [term] 'terminal facilities' should be broadly construed because the purpose of the section is highly remedial."); CSX Corp. — Control — Chessie and Seaboard C.L.I., 363 I.C.C. 521, 585 (1980) (footnote omitted) (CSX Control) ("[S]ince our power to make terminal facilities of one carrier available to another is remedial in nature, the term should be construed liberally.").

[69] See RGI/Soo, slip op. at 10-11; UP/SP, 1 S.T.B. at 447 ("The three KCS segments are 'terminal facilities' under 49 U.S.C. 11103 because each lies in the middle of a city, and each is used for switching and interchange movements as well as for line-haul movements through the terminal.").

Applicants acknowledge that, as UP has pointed out, we have held that "[a] 'terminal area' (as opposed to main line track) must contain and cannot extend significantly beyond recognized terminal facilities, such as freight or classification yards or team tracks, and a cohesive commercial area immediately served by those facilities." Golden Cat, slip op. at 7. Applicants maintain, however, that, although UP views Owatonna as a "rural outpost" much like any other, the fact of the matter is that Owatonna is, by any measure, "a cohesive commercial area." Owatonna, applicants explain, is a city of over 20,000 people; it is the 5th largest city in southern Minnesota and the county seat for Steele County; it is one of the few small cities in the entire country that is served by three freight railroads and a major interstate highway; it has more than 500 retail, wholesale, and professional firms and over 40 industrial firms; and its primary and secondary retail trade area consists of $285 million of purchasing power. And, applicants add, whereas Golden Cat dealt with a single industry that was served by an industry track located out in the middle of nowhere, Owatonna is a significant industrial center that plays a vital role in the economic infrastructure of southern Minnesota.

Applicants apparently concede that, as alleged by UP, the relevant Owatonna trackage has no freight yards, no classification yards, no team tracks, no engine facilities, and no car facilities. Applicants assert, however, that, under our precedents, "terminal facilities" exist where the trackage is used for switching and interchange movements as well as for linehaul movements through the terminal; and, applicants add, DM&E, on the one hand, and, on the other hand, IC&E and its predecessors[70] have performed the type of operations on the trackage that bring the trackage within the framework and meaning of "terminal facilities." Applicants explain: that, within the framework of the extremely limited rights granted to DM&E on the Owatonna trackage, DM&E uses UP trackage today to switch the siding to Owatonna Concrete in Owatonna; that, some years ago, DM&E used the trackage to switch the sidings to Miles Homes (which has since gone out of business) and Interstate Mills (which has since removed its rail siding); that, prior to the creation of DM&E in 1986, CNW (DM&E's immediate predecessor) and the Milwaukee Road (IC&E's distant predecessor) interchanged cars at Owatonna over a portion of the UP trackage via a track connection which still exists between the two main lines, a track connection (applicants add) that is known today as "the transfer track"; that, although DM&E and IC&E do not today (and although DM&E and I&M did not, on or after January 1, 2000) use the UP trackage to perform switching and interchange operations, DM&E and either I&M or CPR did, on certain occasions prior to January 1, 2000, use the UP trackage to perform switching and interchange operations;[71] and that, furthermore, DM&E mainline operations take place over a portion of the trackage (between the western switch and the eastern switch to the IC&E), and

[70] IC&E's immediate predecessor was I&M; I&M's immediate predecessor was CPR; and CPR's immediate predecessor was the Milwaukee Road.

[71] Applicants point out that such operations were necessarily quite limited, because the applicable trackage agreements then allowed DM&E and either I&M or CPR (and now allow DM&E and IC&E) to perform interchange only in connection with industries located at Owatonna.

IC&E mainline operations also occur over the same segment. It is indeed ironic, applicants argue, that UP would point to DM&E's limited usage of the Owatonna segment as a basis for UP's "no terminal facility" argument, when it is precisely the UP restriction on DM&E/IC&E (or I&M or CPR) interchange that has prohibited more extensive use of the trackage for terminal purposes. There is no question, applicants insist, that, if these restrictions had been lifted at some point in the last 16 years, the terminal facilities themselves would have been used more extensively.[72]

(2) Applicants contend that the terminal trackage rights sought by DM&E are in the public interest. A grant of terminal trackage rights, applicants explain, will facilitate prompt effectuation of the benefits of DM&E/IC&E common control,[73] it will prevent the unnecessary construction of duplicative lines,[74] it will not impair UP's ability to handle its own business,[75] and it will be in the interests of the local community in the Owatonna area.[76]

Applicants argue that UP is simply wrong in its claim that DM&E's terminal trackage rights request should be evaluated under the narrow Midtec "competitive access" standard rather than under the broader UP/MP/WP "bridge the gap" standard. See UP/SP, 1 S.T.B. at 448-49 (footnote omitted): "Whether the ICC ever applied its relatively exacting Midtec precedent in the context of a merger is a matter of some debate. In any event, we believe that it is inappropriate to do so here, and,

[72] Applicants also see some irony in the fact that, in the UP/SP proceeding, UP (according to applicants) argued that the actual use of the terminal trackage is not in and of itself dispositive.

[73] The sought rights, applicants advise, will "bridge the gap" between DM&E and IC&E at Owatonna, see SPT v. ICC, 736 F.2d at 723 (noting prior ICC decisions ordering "bridge the gap" terminal trackage rights), and thus allow DM&E and IC&E to establish the kind of unrestricted, efficient, and direct connection that will enable DM&E/IC&E to provide the new routing and competitive rail service contemplated by the DM&E/IC&E control application. And, applicants add, the sought rights, in addition to creating a direct connection between DM&E and IC&E, will also make possible the establishment of unrestricted interchanges between DM&E and CEDR at Lyle, MN, and between DM&E and IANR at Plymouth Junction, IA, and Nora Springs, IA.

[74] See SPT v. ICC, 736 F.2d at 723 ("The purpose of this section is to avoid 'unnecessarily duplicated' lines."). See also Spokane, P. & S. Ry. Co. and Union P. R. Co. — Control, 348 I.C.C. 109, 142-43 (1975).

[75] Applicants note that the UP trackage over which DM&E seeks terminal trackage rights is an "island" that UP does not use and to which UP no longer has access.

[76] Applicants, citing the comments filed by the City of Owatonna, note that strong public support exists for granting the terminal trackage rights sought by DM&E in lieu of requiring DM&E to construct a 1.7-mile alternative connection.

to the extent that ICC cases suggest otherwise, we specifically overrule them. Instead, we will apply the broad 'public interest' standard that is in section 11103(a) itself." See also RGI/CMW, 5 I.C.C.2d at 980 n.30: "In analyzing the various trackage rights sought here, we will not apply the competitive access rules adopted in Intramodal Rail Competition, 1 I.C.C.2d 822 (1985) (49 C.F.R. Part 1144). Those rules address the addition of another carrier to the market outside the context of acquisition or merger proceedings."[77]

Applicants further argue that UP is also wrong in its claim that the UP/MP/WP "bridge the gap" standard should be applied only when terminal trackage rights are sought to remedy a merger's anticompetitive effects, and not when (as here) such rights are sought to promote and facilitate a merger's pro-competitive effects. Applicants assert that we have never created such a distinction, for which, applicants argue, there is no logical basis. Compare UP/SP, 1 S.T.B. at 447-49 ("bridge the gap" terminal trackage rights were imposed to remedy anticompetitive merger effects) and CSX Control, 363 I.C.C. at 583 ("bridge the gap" terminal trackage rights were imposed in view of their "substantial public benefits, by way of improved service capabilities and environmental and safety considerations") with RGI/CMW, 5 I.C.C.2d at 979-80 ("bridge the gap" terminal trackage rights were imposed to facilitate the pro-competitive effects of the transaction itself).

Applicants concede, of course, that, even without the sought terminal trackage rights, DM&E could, on its own, "bridge the gap" between the DM&E and IC&E lines by constructing the 1.7-mile loop connection that was authorized in the PRB Construction case. Applicants contend, however, that it is likely that the cost of constructing this connection would be substantial, and, applicants warn, the cost of construction may not be justified on the basis of control-related diversions alone (the 1.7-mile loop, applicants note, was approved as part of a different case that involved different traffic volumes and different economic assumptions). In any event, applicants add, actual construction would take up to two years,[78] thereby significantly delaying the clear pro-competitive effects of DM&E/IC&E common control.[79]

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[77] Applicants note that, in the UP/SP proceeding, UP urged the Board to apply the UP/MP/WP "bridge the gap" standard to the terminal trackage rights sought by BNSF.

[78] Applicants note that right-of-way acquisition alone could take a year or more to complete, especially if DM&E had to resort to condemnation to acquire some of the right-of-way.

[79] Applicants add that, UP's claim to the contrary notwithstanding, there would be no need to delay commencement of DM&E operations pending rehabilitation of the IC&E line south of Owatonna. Applicants explain that, although an 18-mile stretch of that line is currently "excepted track," the line is in service, and trains can and do run over it.

Applicants further contend that the question that UP has failed to address is, "Why does this make sense?" Why, from a public interest standpoint, would it be preferable to forgo use of an existing 3,700-foot segment of track, which UP does not use and which is not even connected to the rest of its system and which requires no additional construction, and instead insist that DM&E should construct a potentially cost-prohibitive 1.7-mile track through a new area of Owatonna, thereby incurring environmental impacts on the public and causing significant delay in making the benefits of common control available to shippers? And, applicants add, the Board, in weighing the public interest, must take into consideration not only the interests of the railroads and the affected shippers, but also the interests of the residents of the impacted communities.

(3) Applicants contend that private negotiations outside the framework of § 11102 will substantially delay the public benefits of DM&E/IC&E common control and, in any event, are not likely to result in the acquisition of the sought terminal trackage rights. Applicants explain: that DM&E and UP (and, prior to 1996, CNW) have already been engaged, without success, in negotiations for these rights; that such discussions, however, have consistently included demands for unreasonable (and unrelated-to-Owatonna) concessions from DM&E (and later IC&E); that, absent regulatory relief, UP, which would prefer to have DM&E continue to exist as a UP (formerly CNW) feeder line, is highly unlikely ever to grant such rights on any commercially viable terms; and that, in fact, UP has had, and, absent regulatory relief, it will continue to have, no real incentive to grant such rights. Applicants further explain that UP's incentives are to keep DM&E from directly interchanging traffic with IC&E; a direct connection at Owatonna, applicants advise, would allow DM&E/IC&E to divert, away from UP, approximately 1,700 carloads representing approximately $1.7 million in annual revenues.

UP, applicants note, has argued that the "paper barrier" at Owatonna was an integral part of the pro-competitive transaction that created DM&E. UP, applicants further note, has also argued that, in 1986, DM&E could have acquired the Owatonna trackage if it had been willing to pay the exorbitant price (in DM&E's view) demanded by CNW. Applicants contend, however, that the world has changed much in the past 16 years. CNW, applicants explain, has been gobbled up by UP, and is now part of the largest rail system in North America. And DM&E, applicants further explain, is no longer simply a feeder line to the former CNW; rather, it is engaged in a transaction that, if the paper barrier at Owatonna can be eliminated, will allow DM&E/IC&E to become an effective competitor to other railroads operating through the Midwest.

Applicants contend that, UP's assertions to the contrary notwithstanding, DM&E is prepared to negotiate compensation terms with UP as provided in § 11102, and hardly expects to use the trackage for free. Applicants further contend that we should permit DM&E to commence the sought § 11102 terminal trackage rights operations immediately upon consummation of the underlying transaction, and we should reserve jurisdiction to set the terms of compensation if DM&E and UP are unable to reach an agreement on their own. See UP/SP, 1 S.T.B. at 449 n.215 (we pledged that, if BNSF and KCS were unable to reach agreement respecting compensation terms, we would set appropriate terms under condemnation principles; we made this pledge to satisfy the § 11102(a)

requirement that compensation must be "adequately secured" before a rail carrier may begin to use Board-imposed terminal trackage rights). See also SPT v. ICC, 736 F.2d at 723 (holding that, in the UP/MP/WP context, a similar pledge fulfilled the requirement of the term "adequately secured").

Western Coal Traffic League. WCTL contends that UP, in order to preserve its duopoly position in the PRB, has advanced arguments that are contrary to the Board's governing precedents and to UP's own past pronouncements. UP's opposition to DM&E's Owatonna terminal trackage rights application, WCTL argues, should be seen for what it is — an attempt to thwart or otherwise hinder the viability of a new direct PRB rail competitor. The public interest, WCTL believes, favors DM&E's competitive rail service.

(1) WCTL contends that, in UP/SP, UP argued, and the Board agreed, that the words "terminal facilities" in what is now § 11102 should be given a liberal construction. See UP/SP, 1 S.T.B. at 447 (citing with approval the statement in SPT v. ICC, 736 F.2d at 723, that the purpose of what is now § 11102 "is not necessarily limited to benefiting the rail service in the relevant terminal area"). See also UP/MP/WP, 366 I.C.C. at 575 (citing with approval a 1951 case in which the ICC said that, given the remedial nature of what is now § 11102, "the words 'terminal facilities' should be liberally, not narrowly, construed"). UP's newly proffered restrictive "terminal" definition, WCTL contends, is inconsistent with governing precedent and with UP's own past position on the subject.

(2) WCTL contends that, in UP/SP, UP argued, and the Board agreed, that, in the rail merger context, the broad "public interest" standard of what is now § 11102 supports a grant of "bridge the gap" terminal trackage rights. See UP/SP, 1 S.T.B. at 448 (holding that the terminal trackage rights sought by BNSF in UP/SP "fall squarely within" the UP/MP/WP precedent, and specifically overruling any ICC cases to the extent such cases suggested that the Midtec precedent should be applied in the context of a merger). UP's position in the UP/SP proceeding was correct, WCTL argues, and its contrary position here should be rejected. And, WCTL adds, UP's position here is also contrary to the Board's recent pronouncement in Major Rail Consolidation Procedures, slip op. at 10, that it favors additional competitive enhancements sought through merger proceedings.

The City Of Owatonna. The City of Owatonna supports DM&E's application for terminal trackage rights over UP's Owatonna trackage. The sought terminal trackage rights, the City argues, are in the "public interest" as that term is used in 49 U.S.C. 11102.

(1) The City advances four propositions respecting the "public interest" standard, and cites authority in support of each. First, the City cites UP/SP in support of the proposition that the DM&E terminal trackage rights application should be evaluated under the "broad 'public interest'" standard laid out in 49 U.S.C. 11102, and not under the "relatively exacting" "competitive access" standard laid out

in Midtec.[80] Second, the City cites UP/SP and SPT v. ICC, 736 F.2d 708, 723 (D.C. Cir. 1984), in support of the proposition that the "public interest" standard has been met where the applicant, in relation to its efforts to consolidate its system of commonly-held rail lines, is "bridging a gap" that must be filled to effectively link the system together.[81] Third, the City cites Construction And Operation — Indiana & Ohio Ry. Co., 9 I.C.C.2d 783 (1993), in support of the proposition that the "public interest" standard requires consideration of the impacts of applicants' consolidation proposal on the City's

[80] "Whether the ICC ever applied its relatively exacting Midtec precedent in the context of a merger is a matter of some debate. In any event, we believe that it is inappropriate to do so here, and, to the extent that ICC cases suggest otherwise, we specifically overrule them. Instead, we will apply the broad 'public interest' standard that is in section 11103(a) itself. Congress gave us broad authority in both the public interest standard in section 11103 and in the public interest standard of section 11343. Thus, we believe that it is appropriate for us to retain the flexibility to use the terminal trackage rights provision to prevent carriers opposing a merger from blocking our ability to craft merger conditions that are clearly in the public interest as the ICC did in the past." UP/SP, 1 S.T.B. at 448-49 (footnote omitted).

[81] "To ameliorate certain anticompetitive consequences of the 1982 UP/MP/WP merger, the ICC imposed a condition granting DRGW [The Denver and Rio Grande Western Railroad Company] trackage rights over a line between Pueblo and Kansas City, part of which was owned by a non-applicant, SF [The Atchison, Topeka and Santa Fe Railway Company]. UP/MP/WP, 366 I.C.C. at 572. The ICC used its 49 U.S.C. 11103 power to grant terminal trackage rights. Applying this provision, the ICC determined that granting access to this line to make the agency's overall merger conditions effective would be in the public interest. UP/MP/WP, 366 I.C.C. at 574-76. The Court of Appeals affirmed. SPT v. ICC, 736 F.2d at 722-24. We think that the terminal trackage rights sought here [the UP/SP applicants and BNSF sought an order that would permit BNSF to use certain KCS track segments] fall squarely within that precedent." UP/SP, 1 S.T.B. at 448. See also SPT v. ICC, 736 F.2d at 723 (citing cases from 1928 and 1975 in which the ICC granted terminal trackage rights "so that the carriers might 'bridge the gap' between their line and the terminal.").

quality of life.[82] Fourth, the City cites CN/IC in support of the proposition that the "public interest" standard requires consideration of environmental impacts, including safety impacts.[83]

(2) The City argues, in essence, that the "public interest" standard requires us to choose which of the two possible DM&E/IC&E connections — the Alternative O-4 "1.7-mile loop" connection that we authorized in our PRB Construction decision or the Alternative O-5 "MP 87.9" connection for which DM&E now seeks authorization in its terminal trackage rights application — would best serve the public interest. The City claims that there are three reasons why the public interest would best be served by, and why, therefore, we should choose, the Alternative O-5 "MP 87.9" connection.[84]

First: The City contends that, as between the two possible connections, the MP 87.9 connection would do more to promote the health, safety, and welfare of the City's citizens, because a MP 87.9 connection would minimize (whereas the 1.7-mile loop connection would maximize) DM&E train activity, and the adverse consequences thereof, in Owatonna itself and in the general vicinity of Owatonna.[85] The City's explanation, which is given in the context of anticipated PRB coal trains, varies

[82] "[I]n deciding railroad construction applications under the Interstate Commerce Act (Act), we apply the relevant provision — here § 10901 — in light of the rail transportation policy (RTP), set out at 49 U.S.C. § 10101a. As Protestants point out, the RTP, at § 10101a(8), specifically makes it the policy of the United States Government, in regulating the railroad industry — 'to operate transportation facilities and equipment without detriment to the public health and safety * * *.' The Protestants further point out correctly that '[t]he Commission considers the Rail Transportation Policy (49 U.S.C. § 10101a) to be a statement of the public interest which it will use as a guideline in determining whether the public convenience and necessity require or permit construction of a new rail line * * *'." Construction And Operation — Indiana & Ohio Ry. Co., 9 I.C.C.2d at 787-88 (footnote and citation omitted; asterisks in original).

[83] "In determining the public interest, we balance the benefits of the merger against any harm to competition, essential service(s), labor, and the environment that cannot be mitigated by conditions." CN/IC, slip op. at 19. See also CN/IC, slip op. at 55 (we noted that "the majority" of the environmental conditions imposed on the CN/IC merger "address[ed] safety").

[84] The City notes that, in the PRB Construction proceeding, it initially urged the construction of a 10.9-mile bypass to the south of Owatonna. The City recognizes, however, that the "10.9-mile bypass" connection is no longer on the table.

[85] The City cites, as adverse consequences of increased train activity: additional air pollution; additional noise pollution; additional vibrations; impacts on "sensitive" populations near the DM&E/IC&E rail lines; interference with emergency response systems (fire, police, and ambulance); additional rail/pedestrian and rail/highway accidents; and reduction of property values in neighborhoods (continued...)

as between, on the one hand, coal trains moving east on the DM&E line and then south on the IC&E line (or return trains moving north on the IC&E line and then west on the DM&E line), and, on the other hand, coal trains moving east on the DM&E line and then north on the IC&E line (or return trains moving south on the IC&E line and then west on the DM&E line). (a) The City explains that a coal train moving east on the DM&E line and then south on the IC&E line (or a return train moving in the reverse direction) would spend less time in the general vicinity of Owatonna, and would move over fewer curves, with the MP 87.9 connection as opposed to the 1.7-mile loop connection. (b) The City concedes that, even with a MP 87.9 connection, a coal train moving east on the DM&E line and then north on the IC&E line (or a return train moving in the reverse direction) will not be able to move so smoothly through Owatonna; the coal train, rather, will have to enter onto the IC&E line as if it were heading south, it will have to stop, and, before it starts moving north, its locomotives will have to run around the train (and a similar arrangement, in the reverse direction, will have to made for a return train). The City contends, however, that, with a 1.7-mile loop connection, the train would have to spend even more time in the general vicinity of Owatonna, and, although it would not have to stop, it would have to make a "double pass" through downtown Owatonna.

Second: The City contends that, as between the two possible connections, the MP 87.9 connection would do more to promote economic development in and around Owatonna. The City explains: that the 1986 "paper barrier" has effectively eliminated routing, gateway, and market options for shippers located on the DM&E and IC&E lines; that, given the existence of this "paper barrier," industrial sites located on the DM&E and IC&E lines have not been viewed favorably by site developers; and that the removal of the 1986 "paper barrier" would expand options for existing and potential shippers in the Owatonna area by allowing such shippers access to rail-served markets and gateways that would be limited only by the scope of the combined DM&E/IC&E system. Approval of DM&E's terminal trackage rights application, the City argues, would immediately benefit Owatonna and the surrounding community in future efforts to attract rail-served industries, which (the City adds) would increase employment opportunities for Owatonna's citizens.

Third: The City contends that, as between the two possible connections, the MP 87.9 connection would do more to promote an improved Owatonna rail plant and safer operations. The City explains: that the largest single operational change identified in the DM&E/IC&E operating plan involves train and service routings in and around Owatonna; that these changes, however, appear to depend upon a grant of DM&E's terminal trackage rights application; that, although applicants contemplate a $3 million rehabilitation project that will improve the condition of the Owatonna-Austin segment of IC&E's Owatonna-Mason City line and increase track speeds on this line from 10 mph to 25 mph, it is unlikely that IC&E will undertake any such track improvements should the Board deny the DM&E terminal trackage rights application; and that, if IC&E does not undertake such track

[85](...continued)
along the DM&E/IC&E rail lines.

improvements, Owatonna will lose the benefits accruing to the community from improved rail physical plant on IC&E and DM&E, including better and safer railroad track conditions, increased train speeds through town, and faster transit times at grade crossings. And, the City adds, if the combined DM&E/IC&E system can achieve the operating efficiencies that will be made possible by a grant of the DM&E terminal trackage rights application, it will be in a better financial position to ensure that the rail physical plant in Owatonna is maintained to the highest safety standards possible.

Iowa Department Of Transportation. IDOT, which believes that all anticompetitive barriers should be removed whenever possible, supports the DM&E application for terminal trackage rights at Owatonna. Limitations on traffic interchanges, IDOT advises, are patently anticompetitive, and a continuation of the Owatonna interchange barrier would only foster inefficiencies and drive up costs for DM&E/IC&E and their customers while providing little or no benefit to UP.

United States Department Of Transportation. DOT acknowledges that, from almost any perspective, the use of existing track is clearly superior to the construction of new track. DOT further acknowledges the negative impact on competition that commonly flows from "paper barriers." DOT contends, however, that, whether or not the track in question is a terminal facility, DM&E's terminal trackage rights request fails to satisfy applicable Board precedent, and, for this reason, should not be granted.

DOT explains that, in rail merger cases, the ICC and the Board have routinely imposed trackage rights conditions on merging carriers in order to allow other railroads to redress demonstrable competitive losses occasioned by the merger. DOT further explains that the Board has also imposed such conditions on non-merging third party carriers, but "only in limited circumstances where the rights were designed to bridge a gap within broader trackage rights imposed on applicants and deemed necessary to remedy or mitigate anticompetitive effects in the transaction." CN/IC, slip op. at 51-52 (citation omitted). And, DOT adds, without a sufficient nexus between the merger and the trackage rights proposal "to justify consideration under the less demanding public interest standard we have applied in appropriate circumstances within the context of rail merger proceedings," CN/IC, slip op. at 53, the much more demanding requirements of the "competitive access" standard apply.

DOT argues that, because DM&E/IC&E common control presents no threat of competitive harm, the competitive access standard must be applied to DM&E's terminal trackage rights request. DOT further argues, however, that applicants have not met that standard, because they have not introduced any evidence of competitive abuses by UP. And, DOT adds, the Board has already approved a different (though inferior) means by which DM&E and IC&E may connect at Owatonna, and, furthermore, there is a reasonable basis to hope that negotiations will produce a superior DM&E/IC&E connection that will avoid increased community impacts in Owatonna.

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